24877 No. 665

IN THE

United States Court of Appeals

For the Second Circuit

No. 24874

A. H. BULL STEAMSHIP CO.,
Plaintiff-Appellee,

against

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO,
Defendants-Appellants.

APPENDIX OF DEFENDANTS-APPELLANTS

UNITED STATES COURT OF APPEALS FILED

LEE PRESSMAN,
MARVIN SCHWARTZ,
Attorneys for Defendants-Appellants.

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United States District Court

For the Eastern District of New York

A. H. Bull Steamship Co.,

vs.

National Marine Engineers' Beneficial Association, AFL-CIO and International Organization of Masters, Mates and Pilots, Inc., A.F.L. C.I.O.

Docket Entries

(A and B of Record Entries)

Date	*Filings—Proceedings*
1957	
Oct. 7	—Complaint Filed. Summons Issued.
Oct. 8	—Summons Rec'd & Filed. Defts Served.
Oct. 8	—By Zavatt J. Order to Show Cause Filed with Proof of Service for Injunction etc. 10-9-57
Oct. 9	—Before Zavatt J. Motion for injunction, respectfully referred to Judge Bruchhausen
Oct. 9	—Bruchhausen J. Hearing on Order to show cause for Injunction. Hear- Held—Decision Reserved all papers by Oct. 11-57 at 4 P. M.
Oct. 11	—Affidavit of Lee Pressman Filed
Oct. 11	—Affidavit of Charles T. Atkins Filed
Oct. 11	—Affidavit of George C. Kinney Filed
Oct. 17	—Two cross motions to dismiss filed
Oct. 17	—Affidavit of Lee Pressman filed
Oct. 17	—Affidavit of Herbert L. Daggett filed
Oct. 17	—Affidavit of Marvin Schwartz filed
Oct. 17	—Affidavit of Charles T. Atkins filed
Oct. 17	—Suppl. Affidavit of James V. Hayes filed
Oct. 17	—By Bruchhausen J. Decision rendered on motion for injunction—Pltff's motion is granted. Deft's. cross motions are denied—Settle order on 2 days notice etc. (Opinion on file)
Oct. 21	—By Bruchhausen J. Order Granting Preliminary Injunction Filed
Oct. 21	—Bond on Injunction Filed
Oct. 21	—Notice of Appeal Filed—(Deposit of $250.00 made into Registry of Court)
Oct. 23	—By Bruchhausen J. Order Filed Re Preference of Case.
Oct. 23	—Bond on Appeal Filed
Oct. 23	—Record on Appeal with 3 Copies of Index handed to Lawrence Drasin to be forwarded to U. S. C. of A.

Complaint

(Record, pp. 1-7)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, by its attorneys, alleges, upon information and belief, as follows:

1. Plaintiff, a corporation duly organized and existing by virtue of the laws of the State of Delaware with its principal offices at 115 Broad Street, New York City, New York, is, and for many years has been, engaged in interstate and foreign commerce, being a common carrier by sea operating American-flag, dry cargo and other vessels in foreign and coastwise trade.

2. (a) Defendant National Marine Engineers' Beneficial Association, AFL-CIO (hereinafter referred to as "MEBA") and defendant International Organization of Masters, Mates and Pilots, Inc., AFL-CIO (hereinafter referred to as "MMP") are labor organizations which represent employees in the shipping industry, an industry affecting commerce as defined in the Labor Management Relations Act of 1947.

(b) MEBA does business as such through duly authorized officers and agents within the State, City, and Eastern District of New York, with its principal place of business at 132 Third Street, S.E., Washington, D.C. and with various local offices in New York City.

(c) MMP does business, as such, through its duly authorized officers and agents within the State, City, and

Eastern District of New York, with its principal place of business at 105 Washington Street, New York, N. Y.

3. Jurisdiction of this Court over this action derives from, and is based upon—

(a) the Labor Management Relations Act of 1947, Title III, § 301, 61 Stat. 156 (29 U. S. C. § 185); and/or

(b) by reason of the allegations of paragraphs 1 and 2 and because the amount in controversy herein exceeds the sum of Three Thousand ($3,000) Dollars exclusive of interest and costs, the Judicial Code Title 28, U. S. C. § 1332(a).

4. Plaintiff and defendant MEBA executed a written collective bargaining agreement on June 18, 1955, which was, by its terms, to continue in effect until June 15, 1958 and was to cover the employment relations of licensed engineering officers aboard plaintiff's vessels.

Plaintiff and defendant MMP executed a written collective bargaining agreement on July 1, 1955, effective as of June 16, 1955, which by its terms, was to continue in effect until September 30, 1958 and was to cover the employment relations of licensed deck officers (excluding masters) aboard plaintiff's vessels.

Both of these agreements are presently, and at all times material hereto have been, in full force and effect between the respective parties.

5. Section 2 of the agreement between plaintiff and MEBA provides in part as follows:

"There shall be no strikes, lockouts or stoppages of work during the period of this agreement."

6. Section 3 of the agreement between plaintiff and MMP provides in part as follows:

> "There shall be no strikes, lockouts or stoppages of work during the period of this Agreement."

and further:

> "It is understood that in the event a picket line is established against any vessel, the licensed Deck Officers of such vessel will report and perform all of their normal duties incidental to the security of the vessel, passengers and cargo, provided that no Licensed Deck Officer shall be required to work under conditions which may endanger his health or safety. The Organization undertakes to use its best efforts to obtain clearance for such purpose from the Union establishing the picket line."

7. Each defendant is also obligated under its respective collective bargaining agreement to furnish plaintiff on call with such competent and fit licensed officers to serve aboard plaintiff's vessels as plaintiff may require.

8. Commencing on or about August 19, 1956, Seafarers' International Union of North America, Altantic and Gulf District, AFL-CIO (hereinafter referred to as "SIU"), which, in turn, had contractually represented plaintiff's unlicensed merchant seamen for purposes of collective bargaining, caused various vessels owned and operated by plaintiff to be picketed at plaintiff's Brooklyn Terminal in the Port of New York resulting in a total work stoppage by all unlicensed seamen aboard said vessels. Said picketing and the resulting work stoppage by SIU and its adherents constituted an unlawful strike in violation of SIU's existing collective bargaining agreement with plaintiff.

9. Defendant MMP, despite notice of the illegal nature of SIU's strike, on or about August 19, 1957, acting through its officers, agents, employees, and members, ordered, induced and caused its members to respect the SIU picket lines and to cease all work aboard said vessels in violation of its collective bargaining agreement with plaintiff as aforesaid.

Thereafter, and in further violation of said collective bargaining agreement, defendant MMP declared its members to be on strike against plaintiff.

10. Defendant MEBA, acting through its officers, agents, employees and members, also caused its members to cease all work aboard plaintiff's aforementioned vessels by such members and subsequently declared its members to be on strike against plaintiff, all in violation of its existing collective bargaining agreement with plaintiff as aforesaid.

11. Said work stoppages by defendants MEBA and MMP have resulted in preventing four of plaintiff's ships from departing from New York on August 22, 1957, as originally scheduled, and thereafter.

12. On or about September 11, 1957, when SIU caused various of plaintiff's vessels to be picketed at the Port of San Juan, Puerto Rico. resulting in further work stoppages by its members, defendants MEBA and MMP acting through their officers, agents, employees, and members, thereupon caused their members to stop all work on said vessels in further violation of their respective collective bargaining agreements. As a result thereof, plaintiff's vessels have been prevented from departing from said port.

13. Defendants' officers and members have repeatedly threatened to cause and, unless restrained, will cause addi-

tional work stoppages aboard plaintiff's vessels at other ports of call.

14. In addition to striking and refusing to furnish licensed engineering officers for plaintiff's vessels at New York and San Juan, MEBA, acting through its agents, has refused to furnish licensed engineering officers (such officers being at all times ready, willing and able to serve aboard plaintiff's vessels) to plaintiff for certain of its vessels at the Ports of Baltimore and Norfolk and has thereby prevented or delayed such vessels from sailing as scheduled.

15. The aforementioned refusals to furnish officers and work stoppages are in violation of said written collective bargaining agreements and, in particular of Sections 1 and 2 of the agreement with MEBA, and Sections 2(h), 2(m) and 3 of the agreement with MMP. Plaintiff has at all times past performed, and is continuing to perform, all the terms and conditions of its respective collective bargaining agreement with each defendant.

16. The work stoppages caused by defendants aboard plaintiff's vessels have caused and are causing plaintiff serious loss, damage, and irreparable injury for which plaintiff has no adequate legal remedy in that plaintiff is daily losing to its competitors much valuable freight and passenger business which it may never recapture and is suffering an irreparable loss of good will among shippers, governmental agencies, prospective passengers and other segments of the public. Moreover, if said work stoppages continue, defendants' ability to respond in damages for the monetary loss caused plaintiff will be exhausted.

17. Said work stoppages have to date (i.e., October 7, 1957) caused plaintiff monetary damages on account of the six vessels strike-bound at New York and San Juan

alone aggregating not less than $360,000 over and above plaintiff's loss of profits and good will occasioned by the necessity of plaintiff's customers placing their shipments with plaintiff's competitors.

18. Such damages and loss of profits and good will are continuing and will continue each day unless defendants are compelled to abide by their respective collective bargaining agreements.

19. Because of the continuing nature of the damage plaintiff is sustaining each day it is denied the use of its vessels by defendants' unlawful work stoppages, plaintiff requests leave to amend and supplement this complaint as and when the total damage sustained can be ascertained and calculated with reasonable accuracy.

WHEREFORE, plaintiff demands judgment as follows:

(a) that the Court find and declare that defendants by picketing, striking, and refusing to work upon plaintiff's vessels are in violation of their respective collective bargaining agreements with plaintiff as amended;

(b) that the Court order defendants to perform specifically, for the duration of their respective collective bargaining agreements, their obligations to furnish qualified licensed officers and not to strike or cause work stoppages aboard plaintiff's vessels;

(c) that the Court temporarily and permanently enjoin defendants, their officers, agents, and employees and all persons acting in concert and participation with defendants, from picketing, striking, or otherwise causing any work stoppage aboard any or all of plaintiff's vessels so

long as said collective bargaining agreements shall remain in full force and effect;

(d) that the Court award plaintiff such damages as it has sustained to date and hereafter in consequence of defendants' violation of its contractual obligation together with the costs and disbursements of this action;

(e) that the Court grant plaintiff such other, further, and different relief as to the Court may appear just in the premises.

Dated: October 7, 1957.

SATTERLEE, BROWNE & CHERBONNIER,
DONOVAN, LEISURE, NEWTON & IRVINE,
By s/ JAMES V. HAYES,
A Member of the firm,
Attorneys for Plaintiff,
2 Wall Street,
New York 5, N. Y.

Order to Show Cause

(Record, pp. 9-25)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the complaint herein and the annexed affidavit of Milton Williams, it is

ORDERED, that defendants National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, show cause before this Court at a Motion Term thereof to be held in the Federal Building, Room 214, Washington and Johnson Streets, Brooklyn, New York, on the 9th day of October, 1957, at 10:00 A. M. or as soon thereafter as counsel can be heard, why an order should not be entered herein preliminarily enjoining said defendants, their officers, agents, employees, members and attorneys and all persons acting in concert and participation with them from inciting, causing or engaging in any strike or work stoppage affecting plaintiff's vessels or otherwise violating, or inducing or causing others to violate, defendants' existing collective bargaining agreements as amended with plaintiff and for such other, and different relief as the Court may deem just in the premises; and it is

FURTHER ORDERED, that service of a copy of this order together with a copy of the affidavit annexed hereto in the manner prescribed by Title III, § 301(d) of the Labor Man-

agement Relations Act of 1947, 29 U. S. C. § 185(d), on or before October 8, 1957, at 12 noon, shall be sufficient.

Dated: Brooklyn, N. Y.,
October 7th, 1957.

s/ ZAVATT,
U. S. D. J.

Affidavit of Milton Williams

(Record, p. 11)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON WILLIAMS, being duly sworn, deposes and says:

I am Vice President in charge of operations of A. H. Bull & Co., Inc., a subsidiary of plaintiff, A. H. Bull Steamship Co., engaged in operating plaintiff's American-flag, ocean-going, dry cargo vessels. I have represented our steamship lines in labor negotiations since 1936 with the exception of four and one-half years from 1941 to 1946, during which time I was in the Armed Forces of the United States.

I make this affidavit in support of plaintiff's application for an order to show cause why defendants, National Marine Engineers' Beneficial Association AFL-CIO (here-

inafter referred to as "MEBA"), and International Organization of Masters, Mates and Pilots, AFL-CIO (hereafter referred to as "MMP"), should not be enjoined pendente lite from striking or otherwise violating their respective collective bargaining agreements with plaintiff.

For several decades plaintiff and its affiliated companies have engaged in the ocean transportation of freight and passengers in interstate and foreign commerce. Plaintiff currently maintains dock and terminal facilities in the Ports of New York, Philadelphia, Baltimore and San Juan, Puerto Rico. Its vessels regularly call at these and other American and foreign ports to receive and discharge cargoes and passengers.

To my present knowledge, there have been no direct collective bargaining negotiations between MEBA or MMP and plaintiff for the past seven years. During this entire time it was mutually understood and agreed between MEBA, MMP and plaintiff, that the terms of any collective bargaining agreement or any amendments thereto regarding wages or working conditions, which might be agreed to by MEBA, MMP and the member companies of the American Merchant Marine Institute (hereafter referred to as "AMMI"), would become a part of the respective agreements between MEBA and MMP and plaintiff, effective as of the same date that such changes would become effective on the vessels of the companies represented by AMMI. This mutual understanding and agreement was occasioned by the fact that plaintiff is not a member of AMMI.

There is at present a written collective bargaining agreement between MEBA and plaintiff which does not expire until June 15, 1958, and a written collective bargaining agreement between MMP and plaintiff which does not expire until September 30, 1958, which agreements each provide under respective sections denoted "Grievance Procedure and Arbitration":

> "There shall be no strikes, lockouts or stoppages of work during the period of this Agreement."

In addition, the agreement between MMP and plaintiff provides in the same section as follows:

> "It is understood that in the event a picket line is established against any vessel, the Licensed Deck Officers of such vessel will report and perform all of their normal duties incidental to the security of the vessel, passengers and cargo, provided that no Licensed Deck Officer shall be required to work under conditions which may endanger his health or safety. The Organization undertakes to use it best efforts to obtain clearance for such purpose from the Union establishing the picket line."

In addition each union is obligated under its respective collective bargaining agreement to furnish plaintiff on call and as it may, from time to time, require, competent and fit licensed officers to serve as such aboard plaintiff's vessels.

Both the collective bargaining agreement between MEBA and plaintiff, and that between MMP and plaintiff, contain a clause which permits either party to reopen the question of wages under certain stated conditions. Pursuant to this provision, MEBA, on April 11, 1957, notified the plaintiff of its desire for a review of general wages, overtime and pension rates; on April 15, 1957, MMP likewise notified plaintiff that it desired to open wage review negotiations.

On April 17, 1957, I addressed separate letters to MEBA and MMP acknowledging receipt of their requests for wage negotiations, and suggested in line with our standard practice over the years that such negotiations be deferred until they had completed similar negotiations then in progress with AMMI. I acknowledged at that time that

aintiff was prepared to apply the same wage rates and orking conditions which might be agreed upon between EBA and MMP and the AMMI retroactively, if necessary, the effectivqe date agreed upon between those parties. MEBA and MMP thereafter agreed upon a 6% wage crease with AMMI, effective June 16, 1957. Plaintiff at at time notified both unions that it was prepared to sign e same wage amendment. However, MEBA and MMP atly refused to sign with plaintiff the same agreement at they had signed with practically all members of the ry cargo shipping industry.

Pursuant to defendants' requests, I met with the repreentatives of these two unions on or about July 16, 1957. EBA was represented by Messrs. Daggett and Pressman, mong others, and MMP was represented by Messrs. Atins and Bishop. Neither union made any specific wage emands at this meeting. On the contrary, both unions inisted that they had no real dispute with plaintiff. Each nion simply claimed that their members had "a feeling of nsecurity" in plaintiff's employ because of fears that laintiff's parent corporation, American Coal Shipping, nc. (whose officers are not represented by these defendnts), might sometime in the future take over plaintiff's perations thereby removing plaintiff's vessels from the present contracts. Both unions, however, declined plainiff's offer, presented by counsel, to arbitrate any outstanding grievance.

At a subsequent meeting, again no wage or monetary demands were tendered by either union. Despite our assurance that plaintiff's management had no plans or intention of turning any ship over to American Coal, the union representation continued to express concern about job security. To counter this position—and despite the fact that job security was not a proper subject for negotiation under a wage reopener—plaintiff's counsel offered to

discuss a one-year extension of each union's present agreement coupled with a guaranty against any transfer of plaintiff's vessels to American Coal during the life of the agreements as extended. Both unions flatly rejected this suggestion and again refused arbitration.

On August 6, plaintiff telegraphed a renewal of its offer to sign with MEBA and MMP the same wage revision provision, retroactive to June 16, 1957, that both had secured from AMMI. Plaintiff further stated that, until MEBA and MMP signed such a wage revision, plaintiff would accrue the industry wage increase for payment to the members of the Unions upon signing such provision.

On August 12, 1957, I received telegrams from MEBA and MMP rejecting plaintiff's renewed offer of a 6% wage increase on the ground that the offer was unsatisfactory in that it did not meet the problem of job security which had been discussed in the negotiations, and the parties were unable to agree upon the arbitration of this issue.

Thereafter, on August 19, 1957, plaintiff's unlicensed seamen began picketing plaintiff's vessels at its Brooklyn Terminal resulting in a total stoppage of all work by the crews of these vessels; within a week four vessels were and still are strike bound in Brooklyn.

MMP on or about that date ordered its members constituting all licensed deck officers (excepting the masters) aboard said vessels to respect and support the seamen's picket lines and to cease all work being performed by them upon the strikebound vessels. Subsequently MMP informed plaintiff that its work stoppage was now in fact a strike of the members of MMP against plaintiff. Since that date, MMP has picketed plaintiff's vessels in Brooklyn.

Likewise MEBA caused its members to cease all work being performed by them on the strike-bound vessels of plaintiff and has picketed plaintiff's vessels in Brooklyn.

On or about September 11, 1957, the seamen extended their strike to San Juan, Puerto Rico, tying up two more

of plaintiff's ships and virtually closing down plaintiff's New York-to-Puerto Rico service. MEBA and MMP thereupon spread their strike to plaintiff's vessels located in the port of San Juan, Puerto Rico, thereby preventing plaintiff's vessels from departing from said port. By abandoning plaintiff's vessels in San Juan against the orders of the Masters of the vessels the officers involved subjected themselves to Coast Guard disciplinary proceedings which are currently in progress.

The officers of MEBA and MMP are now threatening further strike action at other ports visited by plaintiff's ships. In fact, in the past week defendant MEBA has refused to clear engineering officers—most, if not all, of whom have in the past sailed aboard plaintiff's vessels—to sign articles aboard Bull vessels now at Baltimore and Norfolk. These refusals by MEBA to furnish engineering officers at Baltimore and Norfolk have not been accompanied by any other strike activity and, accordingly, such vessels must be regarded as in violation of Section 1 of MEBA's agreement with plaintiff to furnish engineering officers as and when required.

The actions of MEBA and MMP in striking against plaintiff and picketing its vessels are in breach of the respective written collective bargaining agreements entered into by each union particularly since it was clearly recognized and mutually understood by all parties concerned that neither MEBA nor MMP had any right to strike during wage review negotiations. Moreover, never before has it been suggested to my knowledge that "job security" was a proper subject of negotiations during such a wage review.

On September 30, 1957, Judge Bruchhausen of this Court issued a preliminary injunction against the strike of the unlicensed seamen in an action by Bull, as plaintiff, against the Seafarers' International Union (Civ. No. 18007). This injunction, a copy of which is attached to this affidavit, specifically runs against SIU "and all persons in active concert or participation" with it.

Affidavit of Milton Williams

I am informed by counsel that copies of this order were served upon the chief officers and counsel of both MMP and MEBA. In addition I have caused copies of this order to be served upon all MMP and MEBA pickets wherever they have appeared.

Despite the language of Judge Bruchhausen's order, these Unions have refused to give up their strike and related harassing interferences with plaintiff's operations, thereby necessitating the institution of this suit and the within application for an injunction *pendente lite*.

This unlawful strike by MEBA and MMP has already caused plaintiff severe and irreparable injury through the tie up of its vessels with consequent loss of substantial freight business to its competitors. Unless this unlawful strike is promptly stopped, plaintiff will continue to suffer severe and irreparable injury for which no adequate legal remedy exists.

Plaintiff has no adequate legal remedy because the damage done to plaintiff's position in the shipping industry and its good will among its customers is incalculable in monetary terms. Upon information and belief neither of these unions is in a position to satisfy any substantial monetary judgment if entered herein.

Plaintiff asks to proceed by order to show cause because the injury presently being suffered by the continued acts and activities of the defendants herein necessitates a prompt hearing and disposition of its application for an injunction *pendente lite*.

No previous application has been made for the relief herein sought to any Court or judge thereof.

WHEREFORE, I respectfully submit that an injunction *pendente lite*, substantially in the form set forth in the order to show cause submitted herewith should issue forthwith.

MILTON WILLIAMS.

(Sworn to October 7, 1957.)

Order Granting Preliminary Injunction

Civil No. 18007

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

—o—

A. H. BULL STEAMSHIP CO.,

Plaintiff,

against

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,

Defendant.

—o—

Plaintiff having moved herein for an order enjoining defendant, Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, *pendente lite* and said defendant having cross moved herein and these causes having come before the Court on September 18, 1957, and the Court having heard argument by James V. Hayes, Esq., counsel for plaintiff, and Seymour W. Miller, Esq., counsel for defendant, and received and considered the affidavits and briefs filed on behalf of the respective parties, and, after due deliberation, it appearing that the Court has jurisdiction of this action under Section 301 of the Labor Management Relations Act of 1947 (29 U. S. C., Section 185), that there is presently in existence a collective bargaining agreement between the parties hereto, which agreement, by its terms, will not expire until September 30, 1958, and that defendant has violated and is presently violating

the provisions of said collective bargaining agreement, to wit, Article I, Section 2, and Article II, Section 4 thereof, and it further appearing that, if defendant not be restrained preliminarily, plaintiff will suffer irreparable injury for which it has no adequate legal remedy, the Court having, on September 27, 1957, filed its opinion thereon, and plaintiff having filed, and the Court having approved, the undertaking as prescribed by Rule 65(c) of the Federal Rules of Civil Procedure, it is, therefore,

ORDERED that, effective on October 1, 1957, at 5 P. M., Eastern Daylight Savings Time, defendant, Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, its officers, agents, members, servants, employees, attorneys, and all persons in active concert or participation with them, who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking, or inciting, causing, inducing, or, in any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. H. Bull Steamship Co., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is

FURTHER ORDERED that the said defendant specifically perform its agreement to furnish the plaintiff with capable, competent, and physically fit persons when and where they are required, and of the ratings needed to fill vacancies necessitating the employment of Unlicensed Personnel, in ample time to prevent any delay in the scheduled departure of any vessel covered by said agreement, and it is

FURTHER ORDERED that defendant's cross-motion be and the same is hereby in all respects denied, and it is

Order Granting Preliminary Injunction

FURTHER ORDERED that the Court's opinion filed herein on September 27, 1957, shall constitute the findings of fact and conclusions of law as required by Rule 52(a) of the Rules of Civil Procedure.

Dated: Brooklyn, New York, September 30th, 1957.

Enter,

s/ WALTER BRUCHHAUSEN,
United States District Judge.

A True Copy

Attest

Dated: September 30, 1957.

/s/ PERCY G. B. GILKES,
Clerk.

By /s/ THOMAS B. COSTELLO,
Deputy Clerk.

(SEAL)

Cross-Motion to Dismiss Complaint

(Record, pp. 43-44)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that the undersigned will cross-move this Court, upon the Order to Show Cause herein, for an order

(1) Dismissing the complaint for want of jurisdiction of this Federal District Court over the cause of action set forth in the complaint.

(2) Dismissing the complaint for failure to state a cause of action; or, in the alternative,

(3) For an order

(a) Dismissing that part of the action seeking an injunction on the ground that the Court does not have jurisdiction to grant the relief so requested;

(b) Dismissing that part of the action seeking a declaratory judgment on the ground that all the matters and issues involved therein are involved in and fully determinable by proceedings already pending in the Supreme Court of the State of New York, Kings County, and that, in any event, the claim herein for damages obviates the need therefor; and

(c) Staying further proceedings in this case upon the ground that there is an action pending in the Supreme Court of the State of New York, in and for the County of Kings,

between the same parties, bearing Index Number 9860-1957, for injunctive relief based on the same alleged breach of contract alleged herein, or, in the alternative,

3. For an order staying all proceedings with respect to all the issues herein on the ground of the pendency of a prior action as hereinabove set forth.

WHEREFORE, defendant National Marine Engineers' Beneficial Association requests this Court to dismiss the complaint herein, or to grant an alternate order as hereinabove prayed, and for such other, further or different relief as the Court may deem just and proper.

Dated: New York, N. Y., October 8, 1957.

Yours, etc.,

LEE PRESSMAN,
Attorney for Defendant
National Marine Engineers'
Beneficial Association,
Office & P. O. Address,
225 Broadway,
New York 7, N. Y.

To:

SATTERLEE, BROWNE & CHEREONNIER,
30 Broad Street,
New York 4, N. Y.

DONOVAN LEISURE NEWTON & IRVINE,
2 Wall Street,
New York 5, N. Y.

Cross Motion to Dismiss Complaint

(Record, p. 45)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the complaint herein, a cross motion will be made upon the return of Plaintiffs' motion for a temporary injunction herein, returnable at this Court at a Motion Term thereof to be held in the Federal Building, Room 214, Washington and Johnson Streets, Brooklyn, New York, on the 9th day of October, 1957, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order under Rule 12 of the Federal Rules of Civil Procedure, dismissing the complaint herein, with costs, on the grounds:

1. That the complaint, upon its face, does not state a claim upon which relief can be granted.

Dated: New York, New York, October 9th, 1957.

Yours, etc.,

MARVIN SCHWARTZ,
Attorney for Defendant International Organization Masters, Mates & Pilots,
Office and Post Office Address,
233 Broadway,
New York 7, New York.

To:

DONOVAN LEISURE NEWTON & IRVINE,
2 Wall Street,
New York 5, New York.

Affidavit of Herbert L. Daggett

(Record, pp. 63-83)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HERBERT L. DAGGETT, being duly sworn, deposes and says:

1) I am the president of the National Marine Engineers' Beneficial Association, AFL-CIO (hereinafter referred to as the "MEBA") one of the Defendants herein and make this affidavit in opposition to the motion of the Plaintiff for a temporary injunction, and in support of MEBA's cross-motion to dismiss the complaint.

2) As President, I am the chief executive officer of the MEBA. I have occupied such office since 1949 as a result of successive elections by the entire national membership of MEBA.

Prior to 1949, I was for several years the Business Manager of Subordinate Association No. 38 of MEBA, one of the locals of MEBA, with jurisdiction in Seattle, Washington.

3) The MEBA is a national labor union composed of many subordinate associations whose membership are licensed marine engineers.

Affidavit of Herbert L. Daggett

4) As the President of MEBA, it is one of my functions and duties to supervise and participate in the collective bargaining negotiations with the shipping companies with which MEBA has agreements. I am therefore fully acquainted with all such negotiations and with the terms and conditions contained in our agreements.

A brief explanation of the nature of such negotiations may be helpful.

Negotiations with the shipping companies covering ocean-going dry cargo and passenger vessels are divided between the West Coast companies as one group and the Atlantic and Gulf Coasts Companies as a second group.

The negotiations usually occur at the same time and the agreements are essentially the same—with one important difference, of great importance to this case, which will subsequently be noted.

On the West Coast, the separate shipping companies have authorized an association known as the Pacific Maritime Association to negotiate and execute a single agreement in their behalf. I attach as Exhibit A and make a part of this affidavit, a copy of our current Agreement covering the West Coast Companies.

On the Atlantic and Gulf Coasts, the major group of companies negotiate with MEBA through a Committee known as the "Committee for Companies and Agents, Atlantic and Gulf Coasts." The Plaintiff has not been a member of such Committee.

When the MEBA and such Committee reach agreement in negotiations, copies of said agreement are submitted to the Companies which are represented by the Committee for their individual execution.

Thereafter, the MEBA seeks to complete an agreement with those Companies which are not members of the aforesaid Committee.

Affidavit of Herbert L. Daggett

On occasions, where it has been mutually desirable, the MEBA has executed written preliminary agreements with those Companies, not members of the Committee for Companies and Agents, including the Plaintiff, which provide that any final agreement perfected between MEBA and the Committee for Companies and Agents would automatically become the agreement between MEBA and such independent Companies.

Where either the MEBA or any such independent Company has not desired such procedure, no preliminary written agreement has been executed and separate and independent bargaining ensues with each independent Company including the Plaintiff.

The fact that there has been independent negotiations between MEBA and the Plaintiff can be demonstrated as follows:

There is attached as Exhibit B a copy of the standard agreement between MEBA and the Companies represented by the Committee for Companies and Agents.

The Agreement between MEBA and the Plaintiff (while the same with respect to the crucial provisions to which reference will hereafter be made) is different and has for many years been different in several respects. For example:

(1) In Exhibit B, Section 3 is a provision covering "Physical Examinations." This provision through collective bargaining between the parties hereto is not included in the Agreement between Plaintiff and MEBA.

(2) In 1950, the Agreement between the parties contained a special clause dealing with a special large passenger vessel then operated by the Plaintiff, which clause was not in our standard Agreement.

(3) In 1954, a Captain O. Svendson, Port Captain of Plaintiff, wrote to MEBA stating that for the contemplated

negotiations, Plaintiff had problems unique to itself which it desired to cover apart from the negotiations with any other Company. A copy of such letter is attached as Exhibit C.

5) As of June 15, 1957 under the Agreement which MEBA has with the plaintiff, a wage review was available to MEBA. (See Exhibit B).

Section 39 of the Agreement provides in part:

> "During the period of this agreement, either party may request two wage reviews upon 60 days' prior written notice, provided however, that no wage review shall be held prior to June 15, 1956. Said wage review may include general wages * * * "

In accordance with this section, on April 11, 1957 I sent a written notice to the Plaintiff requesting a wage review. A copy of such notice is attached as Exhibit C.

The Plaintiff responded with a letter dated April 17, 1957, a copy of which is attached as Exhibit D. This letter will show, contrary to the claim of the Plaintiff, there was no agreement between the Plaintiff and the Defendant MEBA with respect to the wage review and that the Plaintiff actually contemplated negotiations with the Defendant after Defendant MEBA had completed its negotiations with the Committee for Companies and Agents.

On the basis of such notice, representatives of MEBA and the Plaintiff met on July 17, 1957 and August 5, 1957 to negotiate such wage review.

As of those dates, the MEBA had concluded its wage review negotiations with the Committee for Companies and Agents.

The MEBA, for reasons which it deemed applicable only to the Plaintiff, submitted its independent wage demands to the Plaintiff. There was no agreement, express

or implied, in connection with this wage review that the MEBA and Plaintiff were obligated to accept whatever agreement had been perfected between MEBA and the Committee for Companies and Agents. It is important to note that neither in the affidavit of Mr. Williams nor in the complaint is there any affirmative claim that any such agreement had been made between MEBA and the Plaintiff in connection with this wage review.

An impasse was reached between the MEBA and the Plaintiff in their negotiations on the wage review. The Plaintiff categorically rejected the wage demand submitted by MEBA. And the MEBA refused to accept the counter offer submitted by the Plaintiff. No compromise offer could be agreed upon.

There is attached as Exhibit E a copy of the demands submitted to the Plaintiff by the Defendant MEBA at its wage negotiations.

Plaintiff was clearly advised at the end of the discussions and in a subsequent telegram that in the face of such impasse, the MEBA was reserving the right to take whatever action it deemed necessary to protect the interests of its membership.

6) On August 21, 1957, the MEBA initiated its picketing, which was begun at the Plaintiff's terminal in Brooklyn, N. Y.

The picketing thus began by MEBA has been conducted exclusively and solely in behalf of MEBA's own independent dispute with the Plaintiff. Such picketing has absolutely no relationship with any other dispute which some other labor union may be simultaneously engaged in with the Plaintiff. MEBA has not acted in concert or conjunction with any other organization that may be engaged in a labor dispute with the Plaintiff.

7) This situation therefore raises the simple question whether the parties under their collective bargaining agreement contemplated that MEBA would have the right to strike, in the event an impasse were reached under a wage review prior to the actual termination date of the Agreement.

This issue will, of course, be more fully analyzed by counsel in our Brief and oral argument before the Court.

But in so far as the parties to the Agreement are concerned, there can be no question as to their intent.

(a) The wage review clause contained in Section 39 of the Agreement (See Exhibit B) does not contain a compulsory arbitration clause to be applicable in the event the parties reach an impasse. It is true that on several occasions in the past, in connection with a wage review, the parties in disagreement have submitted the issue to arbitration but on a mutually voluntary basis.

In 1952 when negotiations on a wage review were under way between MEBA and the Committee for Companies and Agents, Mr. Walter Maloney, then the Chairman of the Commitee, expressed in no uncertain terms that it was the interpretation of the Companies with reference to the wage review clause (which in 1952 was in form similar to that contained in the current Agreement) if an impasse was reached, the parties could, if they jointly agree, submit the issue to arbitration—but if either party refused to so submit, the other could not force arbitration under Section 2 of the Agreement covering "Grievance Procedure and Arbitration" (See Exhibit B).

At that time, MEBA simply stated that it was not contesting such view and in the face of such understanding, the MEBA would obviously have the right to strike in the case of an impasse over wage review—otherwise the wage review would be meaningless if an employer's "No" could not be tested either by arbitration or strike.

(b) To substantiate this interpretation I point to Section 7 of the Agreement (see Exhibit B) which contains a provision covering the fixing of wages for a type of vessel which might come into operation during the term of the Agreement. This provision permits the issue to be raised and it specifically states "in the event of disagreement in negotiations said issue *shall* be submitted to arbitration in accordance with the provisions of Section 2." (Provision covering Grievance Machinery and Arbitration.)

In other words this provision, inserted in our contract negotiations of June 1955 shows that when the parties wanted to provide for compulsory arbitration on a wage issue, they knew precisely how to handle it and did so specifically.

(c) I also point to Section 38 of our Agreement (Exhibit B). This Section title "Pension and Welfare Plan" provides for the establishment of a Pension and Welfare Plan through employer contributions. Paragraph 3 of such Section states:

> "3. There shall be a reopening on contributions to said Plan on June 15, 1958."

Pursuant to this Section, the Parties have executed a Master Agreement and Declaration of Trust which provides that the issue of the amount of contribution, subject to reopening, as above provided, shall be determined by "collective bargaining between the parties." Here again the parties specifically contemplated that a reopening clause was not to be subject to compulsory arbitration.

(d) Further, I point to our Agreement on the West Coast which is attached to this affidavit as Exhibit A. It will be noted that this Agreement is essentially the same in all basic respects with our current Agreement with Plaintiff.

However, on the issue of wage review contained in Section 32, the West Coast Agreement specifically provides that

> "The provisions of Section 2 shall be applicable in the event of disagreement at the time of wage review." (And Section 2 referred to is the same provision dealing with "Grievance Procedure and Arbitration.")

This provision in the West Coast Agreement was incorporated in the 1949 Agreement and has continued ever since.

The Parties to the Agreement on the Atlantic and Gulf Coasts were fully aware of such provision but consistent with the interpretation expressed by Mr. Maloney deliberately left it out in order to avoid the compulsory obligation, in the event of impasse, to submit a disputed wage review to arbitration.

(e) The parties to the Agreement clearly understood that Section 2 of the Agreement dealing with "Grievance and Arbitration Machinery" meant the following: Only such disputes as relate to the "interpretation or performance of this agreement" (See Section 2 of the Agreement, Exhibit B) could be made the subject of a grievance and be submitted to arbitration.

As shown, the general wage review could not be forced into arbitration under Section 2 by one party against the wishes of the other.

Therefore, the No Strike Clause *contained in Section 2* was intended to be confined exclusively to the type of disputes which were covered by Section 2.

(f) Mr. Williams in his affidavit states that the Defendant MEBA declined Plaintiff's offer presented by its counsel to arbitrate in the outstanding grievance. This is not a complete and accurate statement of what occurred in our negotiations.

Affidavit of Herbert L. Daggett

First let me state that at no time in our negotiations did Plaintiff claim, as they simply could not, that the issue in dispute, namely, the wage issue had to be submitted to arbitration under the section of the Agreement dealing with grievance machinery and arbitration. It was understood by both parties, the Plaintiff and the Defendant, that such wage issue that had arisen under the wage review with respect to which the parties had reached an impasse, was not an item which fell within the province of Section 2 of the Agreement covering grievance machinery and arbitration. At no time did the Plaintiff make any claim to the contrary. It is true that in the course of the negotiations, the parties discussed the possibility of voluntarily agreeing to the submission of the matter in dispute to arbitration. However, the parties were unable to agree as to the issues to be submitted to arbitration and thus no agreement could be arrived at.

(g) It would have been patently absurd for MEBA to enter into a three year agreement with a wage review on general wages and an understanding that compulsory arbitration of such wage issue in the event of an impasse was not available unless it was also understood between the parties that the MEBA upon such impasse could exercise its right to strike.

8) It is therefore submitted that our strike in support of our admitted wage demand, which has been refused by the Plaintiff, is clearly within the rights of MEBA and cannot in anyway be construed to be a breach of contract.

9) In view of the fact that MEBA on August 21 initiated its own independent picketing of the vessels of the Plaintiff because of its wage dispute with the Plaintiff, the members of MEBA have, with full justification, refused to man the vessels of the Plaintiff, which have thus been picketed.

It would be an anomaly that where a labor union was engaged in a labor dispute with an employer, that the employer can complain that the members of a labor union are refusing to accept employment with the employer.

But in any event, Plaintiff in its complaint and the affidavit of Milton Williams seem to contend that MEBA is in violation of its agreement with the Plaintiff because it has refused, when requested to do so, to furnish Plaintiff with competent and fit licensed marine officers. I point to Section 1 of the Agreement (Exhibit B) from which it should be obvious that under no circumstances is the MEBA *obligated* to furnish personnel. Section 1 of the Agreement imposes an obligation *upon the Plaintiff* under certain circumstances to request the MEBA for personnel; but there is absolutely not a single word contained in said Agreement, Section 1 or otherwise, which imposes any obligation on MEBA to provide such personnel. The Agreement specifically provides that where MEBA is requested to provide personnel and is unable to do so, the sole obligation imposed upon MEBA is to notify the Company of such fact so that the Company is then free to secure personnel from other sources.

10) As former Business Manager of Subordinate Association No. 38 of MEBA in Seattle, and as President of the MEBA, I am fully acquainted with the type of membership within the MEBA. Further, I hold a license as a Chief Marine Engineer. Prior to my becoming an official of a local and the National Organization, I sailed under my license for many years. As such, I am fully acquainted with the type of work performed by marine engineers who fall within the jurisdiction of the MEBA.

I can state most categorically that licensed marine engineers, who comprise the entire membership of MEBA,

without a single exception, in the nature of their work have authority in the interests of the employer for whom they may be working, to hire, transfer, suspend, lay off, recall, promote, discharge, sign, reward or discipline the unlicensed personnel who work in the engine department, over which the licensed engineers have supervision, or responsibility to direct such unlicensed personnel in the engine department, or adjust the grievances of the unlicensed personnel in the engine department, or to effectively recommend any such action. In the furtherance of their duties, licensed engineers do not exercise the authority just described merely as a routine or clerical nature, but they must exercise the use of independent judgment.

Every single member of the MEBA performs work of the nature which I have just described. The type of marine personnel over whom the MEBA assumes jurisdiction and takes in as members is precisely that which I have just described. We do not have any members who do not fall within such description, insofar as their duties and responsibilities are concerned.

It is undoubtedly true with respect to the licensed marine officers employed by the Plaintiff. They exercise precisely the duties and responsibilities, and the nature of their work is exactly as I have above described them.

11) Plaintiff in its complaint claims that when the members of Defendant MEBA refused to cross the picket line established by another labor organization, namely the SIU, when it initiated its strike on August 19, 1957 with respect to its own independent labor dispute between the SIU and the Plaintiff, MEBA was in violation of its agreement with the Plaintiff. I wish to call attention to a provision contained in the collective bargaining agreement between MEBA and the Plaintiff which is set forth in Section 2 of the Agreement. This provision is that:

"(h) No licensed engineer shall be required to work under conditions which may endanger his health or safety."

This provision has, historically and traditionally, been consistently understood by the parties to the many maritime collective bargaining agreements, all of which contain this or a substantially similar provision, to mean that a maritime union will not be deemed to be in violation of its contract when its members refuse to cross a picket line of another labor union where this is involved in carrying out their normal work and functions.

12) I have examined the records of the National office of the MEBA, which contain the home addresses of the members of MEBA. From such records I can definitely state that many individual members of the MEBA reside and are domiciled in the State of Delaware.

WHEREFORE, it is prayed that the motion for a temporary injunction herein be denied and the cross-motion to dismiss the complaint be granted.

HERBERT L. DAGGETT.

(Sworn to October 9th, 1957.)

Exhibit A, Annexed to Affidavit of Herbert L. Daggett

Agreement between National Marine Engineers Beneficial Association (Pacific Coast District) and Pacific Maritime Association. Effective date June 16, 1955.

(Copies of this exhibit will be handed up upon argument.)

Exhibit B, Annexed to Affidavit of Herbert L. Daggett

Agreement between National Marine Engineers Beneficial Association and Atlantic and Gulf Dry Cargo and Passenger Vessel Companies and Agents, June 18. 1955 to June 15, 1958.

(Copies of this exhibit will be handed up upon argument.)

Exhibit C, Annexed to Affidavit of Herbert L. Daggett

A. H. BULL & CO.
INCORPORATED
General Offices—115 Broad St., New York 4, N. Y.

April 7th, 1954.

Mr. Herbert L. Daggett,
Marine Engineers' Beneficial Assn.,
132 Third Street, S. E.,
Washington 3, D. C.

Dear Mr. Daggett:

We met today with Mr. James T. Smith, your Contract Enforcing Agent, regarding the renewal of our Contract with the Marine Engineers' Beneficial Association.

We discussed with Mr. Smith some of the problems we have had during the last year and upon his request we are writing you regarding same. They are as follows:

1. When a vessel is in port less than twenty-four (24) hours, sea watches are maintained and engineers demanding overtime for watches stood after 5 PM and before 8 AM, although they have not worked in excess of eight (8) hours.

Exhibit C, Annexed to Affidavit of Herbert L. Daggett

2. When engineers are maintaining night watches and sleeping in all night demands rest period the next day.'

3. We discussed the problem we have had when a ship calls at any continental U. S. port where she only loads part cargo and engineers are maintaining sea watches. Night engineers have reported on board and demanded to be engaged after 5 PM and before 8 AM and on Saturdays and Sundays although he has not been ordered by our agents.

4. The discrepancy between section 17 "Sea Watches", and section 26 "Rest Before Watch". On the day of departure sea watches usually are set at the beginning of the normal period of time required for warming up the engines before sailing.

Section 26, which states that: "No licensed engineer shall be required or permitted to take charge of a watch upon leaving or immediately after leaving port unless such officer shall have had at least six hours off duty within the twelve hours immediately preceding the time of sailing".

We feel that some of these matters ought to be discussed further before signing a new contract.

As you know, our run is entirely different from most of the steamship companies, as our vessels are on a two weeks' turn around and sea watches on our scheduled runs are maintained from the time they leave a Northern port until they arrive back North.

Very truly yours,

A. H. Bull & Co.,
Agents

/s/ O. Svendsen
O. Svendsen
Port Captain

OS/rs

Exhibit D, Annexed to Affidavit of Herbert L. Daggett

A. H. BULL & CO.
INCORPORATED

General Offices—115 Broad St., New York 4, N. Y.

April 17, 1957

National Marine Engineers
Beneficial Association
132 Third Street, S. E.
Washington 3, D. C.

Attention: Mr. H. L. Daggett, President

Gentlemen:

This will acknowledge your notice of your desire for a general wage review under the contract presently existing between this company and your organization.

As in the past we would prefer to defer any negotiations on the contract until after you have completed your negotiations with the representatives of the Institute. If this is agreeable to you we would appreciate a letter confirming this arrangement.

Very truly yours,

A. H. BULL & Co.,
Agents

/s/ M. WILLIAMS
M. Williams
Vice President
For Operations

NW:ED

Exhibit E, Annexed to Affidavit of Herbert L. Daggett

WAGE REVIEW DEMAND MADE ON BULL LINE

That in addition to the 6% wage increase granted in the Industry that the Licensed Engineers employed by the Bull Line be paid an additional amount sufficient to compensate them for a possible complete loss of their jobs through the transfer of their vessels to American Coal.

Affidavit of Lee Pressman

(Record, pp. 46-64)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK } ss.:

LEE PRESSMAN, being duly sworn, deposes and says:

I am the attorney for the National Marine Engineers' Beneficial Association, the defendant herein, and am personally familiar with the facts hereinbelow set forth.

Affidavit of Lee Pressman

I make this affidavit in opposition to plaintiff's motion for a temporary injunction and in support of defendant's cross-motion to dismiss the complaint.

On August 27, 1957 plaintiff herein instituted proceedings by Order to Show Cause, dated August 23, 1957, the affidavit of Milton Williams, sworn to August 22, 1957 and the Complaint, verified by the said Williams August 22, 1957.

The action was brought in the Supreme Court of the State of New York, County of Kings, Index Number 9860-57) and the proceedings were directed toward the issuance of a temporary and permanent injunction against defendant's strike and picketing of plaintiff's vessels.

The complaint alleged that the strike and picketing were in breach of a collective bargaining agreement between the parties and did not constitute a labor dispute within the meaning of New York's Little Norris-LaGuardia Act, Section 876 (a) of the Civil Practice Act. The issues in such case were precisely the same as in this case, except that in the State Court case no demand was made for a declaratory judgment or for damages. The Court, per Mr. Justice Cone, sitting in Special Term, Part I, denied the motion for a temporary injunction and dismissed the complaint on the ground that the case was covered by Section 876 (a) of the Civil Practice Act. A copy of said decision is annexed hereto and made a part hereof and labelled Exhibit "A".

On September 9, 1957, plaintiff, again by order to show cause, brought on a new application in the same part of the same court, for the relief previously denied. Plaintiff filed an amended complaint, verified by Mr. Williams on September 4, 1957, and a new affidavit by Mr. Williams sworn to September 3, 1957. This matter was heard by Mr. Justice Brown, who delivered an opinion confirming that the subject matter of the complaint established the

Affidavit of Lee Pressman

existence of a labor dispute between the parties and set the case down for a full hearing before Mr. Justice McCrate, to hear and report on the facts involved in the dispute. The new affidavit of Mr. Williams, and the said amended complaint verified by Mr. Williams, and the opinion of Mr. Justice Brown are annexed hereto and made a part hereof and labelled Exhibit "B", Exhibit "C" and Exhibit "D" respectively.

The date of the hearing before Mr. Justice McCrate has been set for October 14, 1957.

I was present in Court and argued on behalf of the defendant on August 29, 1957 and on September 9, 1957, when the aforesaid two orders to show cause were being presented to the Court. Mr. Cherbonnier of Satterlee, Browne & Cherbonnier argued for the plaintiff herein. The papers presented and the oral arguments made on behalf of the plaintiff embraced essentially what is now before this Court and on which a full hearing is to be held before Mr. Justice McCrate.

All that is new here is the demand for declaratory relief and damages.

LEE PRESSMAN.

(Sworn to October 8, 1957.)

Exhibit A, Annexed to Affidavit of Lee Pressman

Form 91

MEMORANDUM

SUPREME COURT

KINGS COUNTY

SPECIAL TERM—PART I

By CONE, *J.*

Dated September 3, 1957

———o———

A. H. BULL STEAMSHIP COMPANY

vs.

THOMAS ATKINS as President of the INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS, INC., and INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS, INC., a labor organization affiliated with the American Federation of Labor and Congress of Industrial Organizations, and H. W. PETERS as Business Manager and Secretary-Treasurer and IRVING A. LAMY and RUSSELL WOODMAN each as Asst. Business Manager and Asst. Secretary-Treasurer of the MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, a labor organization affiliated with the American Federation of Labor and Congress of Industrial Organizations.

———o———

SATTERLEE, BROWNE & CHERBONNIER, Esqs.
Attorneys for plaintiff
30 Broad Street
N. Y. 4, N. Y.

Exhibit A, Annexed to Affidavit of Lee Pressman

MARVIN SCHWARTZ, Esq.
Attorney for defendants Atkins and International Organization Masters, Mates and Pilots, Inc.
233 Broadway
N. Y. 7, N. Y.

LEE PRESSMAN, Esq.
Attorney for defendant National Marine Engineers Beneficial Association
225 Broadway
N. Y., N. Y.

The action herein is a companion to the motion by the plaintiff in its action against the Seafarers International Union of North America decided herewith. The motions seek similar relief upon facts almost identical. The reasons set forth in the disposition of the Seafarer's case are applicable herein and, accordingly, similar disposition is made herein. Settle order on notice.

(initialed)
J. C.
J. S. C.

Exhibit A, Annexed to Affidavit of Lee Pressman

Form 91

MEMORANDUM

SUPREME COURT

KINGS COUNTY

SPECIAL TERM—PART I

By CONE, *J.*
Dated September 3, 1957

—o—

A. H. BULL STEAMSHIP COMPANY

vs.

PAUL HALL, as Secretary-Treasurer, and CLAUD SIMMONS, EDWARD MOONEY and JOSEPH ANGING, each as Assistant Secretary-Treasurer of the SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, and SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, a labor organization affiliated with the American Federation of Labor and Congress of Industrial Organizations.

—o—

SATTERLEE, BROWNE & CHERBONNIER, Esqs.
Attorneys for plaintiff
30 Broad Street
N. Y. 4, N. Y.

SEYMOUR W. MILLER, Esq.
Attorney for defendants
26 Court Street
Brooklyn 1, N. Y.

Exhibit A, Annexed to Affidavit of Lee Pressman

Plaintiff moves for an injunction pendente lite enjoining the defendants from picketing its place of business or from interfering with the discharging, loading, moving or otherwise operating its vessels. Defendants cross-move to dismiss the complaint on the grounds that it fails to state facts sufficient to constitute a cause of action and that the court lacks jurisdiction of the subject matter.

The facts briefly reveal that the parties entered into an employment contract effective Oct. 15, 1956 and expiring Sept. 30, 1958. The contract contains a reopening and renegotiation clause relative to wages and other monetary matters. This clause in the preamble of the contract reads as follows:

> "Application by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause of termination of this agreement".

Article II, Section 4, further provides that there shall be no strikes, lockouts or stoppages of work while the provisions of this agreement are in effect. Predicated upon the reopening clause, notice was duly served upon plaintiff seeking a renegotiation of wages and other monetary matters. After a series of conferences, the parties reached a deadlock resulting in the picketing of plaintiff's place of business.

It is plaintiff's contention that the right of renegotiation and the failure to reach an amicable adjustment of wages, etc. did not carry with it the concomitant right to strike in support thereof but rather that the defendants were relegated to Section 3, Article II of the contract relative to the arbitration of grievances arising in connection with the performance of the agreement. That inasmuch as plaintiff is seeking to enforce the provisions of the agree-

ment between the parties, Section 876-a of the Civil Practice Act is not applicable. With this contention the court does not agree. A labor dispute does not lose its characterization as such merely because it occurs in violation of an agreement and if there is a bona fide labor dispute between the parties, the plaintiff may not avoid the requirements of Section 876-a merely by showing the violation of an agreement by defendants. (*Bert Mfg. Co.* v. *Local 810 etc.*, 136 Supp. 2nd 806.)

Section 876-a, subd. 10-e, in defining the term "labor dispute" reads as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations * * *."

It is needless to say that an impasse in wage negoations between an employer and the union bargaining in behalf of its employees constitutes a "controversy concerning terms or conditions of employment" within the meaning of the above-quoted sub-section. (*Vim Electric Co.* v. *Solomon*, 67 N. Y. S. 2nd 908). It would appear that in this state the weight of authority supports the proposition that a breach of a collective bargaining agreement constitutes a controversy concerning terms and conditions of employment and is a labor dispute within the meeting of Section 876-a. (*DiNeri et al*, v. *Gene Louis, Inc.*, 261 App. Div. 920, aff'd 288 N. Y. 592 [with modifications not here material]; *Scafidi* v. *Debnar*, 22 N. Y. S. 2nd 390; *Green Bus Lines, Inc.* v. *Flynn*, 61 N. Y. S. 2nd 663).

While the court is clearly sympathic to those employees not parties to the dispute who are unable to earn their livelihood because of the dispute, it finds that plaintiff is not

entitled to the relief sought sought herein since it must comply with Section 876-a, subd. 1 and 4.

Accordingly, the motion for an injunction pendente lite is denied, without prejudice to a renewal thereof if plaintiff is so advised upon the service of an amended complaint. In view of this disposition, the court grants the motion to dismiss with leave to serve an amended complaint.

(initialed)
J. C.
J. S. C.

Exhibit B, Annexed to Affidavit of Lee Pressman

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON WILLIAMS being duly sworn deposes and says:

I am Vice-President in Charge of Operations of A. H. Bull & Co., Inc. I have represented our steamship lines in labor negotiations since 1936 with the exception of 4½ years spent in the service from 1941 to 1946.

To my personal knowledge there has been no direct collective bargaining negotiations between the International Organization Masters, Mates and Pilots, Inc. (which I shall hereafter refer to as MM&P) or the Marina Engineers' Beneficial Association (which I shall hereafter refer to as MEBA) and plaintiff for the past seven years. During this entire time it was mutually understood and agreed between plaintiff and MM&P and MEBA that the terms of any collective bargaining agreement or any amendments regarding monetary matters or working conditions which were agreed to between the MEBA and MM&P and the Committee for Companies and Agents representing member companies of the American Merchant Marine In-

stitute would be placed into effect and become the agreement between the MM&P and MEBA and plaintiff effective as of the same date that such changes became effective on the vessels of the companies represented by the Committee. The reason for this mutual understanding and agreement is due to the fact that plaintiff is not a member of the Committee.

There is at present a collective bargaining agreement between the MM&P and plaintiff which does not expire until September 30, 1958, and a collective bargaining agreement between the MEBA and plaintiff which does not expire until June 15, 1958, which agreements provide under "Grievance Procedure and Arbitration":

> "There shall be no strikes, lockouts or stoppages of work during the period of this agreement."

When the last wage increase of 6% was agreed to in collective bargaining between the MM&P and the Committee and the MEBA and the Committee which became effective June 16, 1957 plaintiff notified both the MM&P and the MEBA that it was prepared to sign the same wage amendment increase but both the MM&P and the MEBA refused to sign the same agreement with plaintiff that they had signed with the member dry cargo companies of the Committee,

When the MM&P and the MEBA prepared their respective standard collective bargaining agreements covering the officers on the dry cargo vessels operated on the Atlantic and Gulf Coasts the name of plaintiff was incorporated in both of the said standard agreements published by the respective Unions as will be seen on page 54 of Exhibit A and page 41 of Exhibit B attached to the original complaint and incorporated by reference and made a part of the amended complaint.

Exhibit B, Annexed to Affidavit of Lee Pressman

At no time has either the MM&P or the MEBA made any specific demands on plaintiff but has refused to sign the same collective bargaining agreement with plaintiff that they have signed with other companies on the ground that the 6% increase granted by the other companies and accepted by the MM&P and MEBA was not acceptable in the case of plaintiff.

When the MM&P and the MEBA went on strike on August 21st against plaintiff and picketed its vessels then in the port of New York such action constituted a breach of the collective bargaining agreements with plaintiff as it was clearly recognized and mutually understood that both the MM&P and the MEBA had no right to strike under any wage reopening because each contract provided for arbitration of any dispute that might arise between the parties.

Submitted with this affidavit is a copy of the amended complaint which I have verified on behalf of the plaintiff in this action and which I incorporate by this reference in this affidavit. As will be seen from the amended complaint the individual defendants herein and the defendant Unions have caused through picketing and other means stoppages of work aboard four of plaintiff's vessels presently at plaintiff's Brooklyn piers. These stoppages of work clearly violate the "no strike" clauses of the present collective bargaining agreements between plaintiff and defendant Unions.

This unlawful strike has already caused plaintiff great and irreparable injury through the tie-up of their vessels with a consequent loss of substantial freight business to plaintiff's competitors. Unless this unlawful strike is promptly enjoined, plaintiff will continue to suffer great and irreparable injury for which no adequate legal remedy exists.

In addition to the damage caused plaintiff by virtue of the present delay in the movements of the SS Frances, the

Exhibit B, Annexed to Affidavit of Lee Pressman

SS Kathryn, the SS Beatrice and the SS Elizabeth plaintiff has other vessels whose operations could be affected unless defendants are enjoined.

Plaintiff has no adequate legal remedy because the damage done to plaintiff's position in the shipping industry and to its good will amongst its customers is incalculable in monetary terms.

Plaintiff asks to proceed by an Order to Show Cause because the damage presently being suffered by the continuing acts and activities of the defendants herein necessitating a prompt hearing and disposition of its application for an injunction *pendente lite*.

Application for similar relief was made in the original complaint which was denied with leave to file an amended complaint and the amended complaint is in compliance with the Order dated September 3, 1957 of Justice John E. Cone of this Court.

WHEREFORE I respectfully submit that an injunction *pendente lite* substantially in the form set forth in the Order to Show Cause submitted herewith should issue forthwith.

MILTON WILLIAMS.

(Sworn to September 4, 1957.)

Exhibit C, Annexed to Affidavit of Lee Pressman

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

A. H. BULL STEAMSHIP COMPANY,

Plaintiff,

against

THOMAS ATKINS as President of the INTERNATIONAL ORGANIZATION MASTER, MATES AND PILOTS, INC., and

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS, INC., a labor organization affiliated with the American Federation of Labor and Congress of Industrial Organizations, and

H. W. PETERS as Business Manager and Secretary-Treasurer and IRVING A. LAMY and RUSSELL WOODMAN each as Asst. Business Manager and Asst. Secretary-Treasurer of the MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and

MARINE ENGINEERS' BENEFICIAL ASSOCIATION a labor organization affiliated with the American Federation of Labor and Congress of Industrial Organizations,

Defendants.

Plaintiff, A. H. Bull Steamship Company, by Satterlee, Browne & Cherbonnier, its attorneys, alleges upon information and belief as follows:

Exhibit C, Annexed to Affidavit of Lee Pressman

1. Plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Delaware and is engaged in and carrying on a business affecting commerce, to wit, that of a common carrier by water in foreign and intercoastal trade with its principal office at 115 Broad Street, New York, New York, and within the jurisdiction of this Court.

2. The defendant Thomas Atkins as President, hereinafter called individual defendant, is a citizen of the State of New York and defendant International Organization Masters, Mates and Pilots, Inc., hereinafter called MM&P, is and at all times hereinafter mentioned was and at the time of the filing of this complaint is an incorporated labor organization with its principal office located at 107 Washington Street, New York, New York, and is subject to the jurisdiction of this Court.

3. The defendants, H. W. Peters as Business Manager and Secretary-Treasurer and Irving A. Lamy and Russell Woodman each as Asst. Business Manager and Asst. Secretary-Treasurer, are citizens of the State of New York and defendant, Marine Engineers' Beneficial Association, hereinafter called MEBA, is and at all times hereinafter mentioned was and at the time of the filing of this amended complaint is an unincorporated association, to wit, a labor organization with its principal office located at 752 Broadway, New York, New York, and is subject to the jurisdiction of this Court.

4. On or about July 1, 1955 plaintiff and the MM&P duly entered into and signed a written collective bargaining agreement covering certain classifications of persons employed by plaintiff, to wit, the licensed deck officers aboard the American flag ocean going dry cargo vessels operated by plaintiff. The said agreement is now in full

force and effect and does not expire until September 30, 1958. A copy of such agreement was attached to the original complaint and marked Exhibit A and is incorporated herein by reference and made a part hereof. Section 3(a) thereof provides:

> "There shall be no strikes, lockouts, or stoppages of work during the period of this agreement. * * *"

5. On or about June 18, 1955 plaintiff and the MEBA duly entered into and signed a written collective bargaining agreement covering certain classifications of persons employed by plaintiff, to wit, the licensed engineer officers aboard the American flag ocean going dry cargo vessels operated by plaintiff. The said agreement is now in full force and effect and does not expire until June 15, 1958. A copy of such agreement was attached to the original complaint and marked Exhibit B and is incorporated herein by reference and made a part hereof. Section 2(a) thereof provides:

> "There shall be no strikes, lockouts or stoppages of work during the period of this agreement."

6. The defendant Unions negotiate their standard dry cargo vessel collective bargaining agreements on the Atlantic and Gulf Coasts with a committee representing certain American flag dry cargo vessel operators known as the "Committee for Companies and Agents".

7. Plaintiff is not directly represented by the said "Committee for Companies and Agents" but has for many years past and now has the same agreement with the MM&P and the MEBA as negotiated with the said Committee.

Exhibit C, Annexed to Affidavit of Lee Pressman

8. Exhibit A, which is prepared and published by the MM&P, attached to the original complaint and incorporated herein by reference and made a part hereof, shows on its face at page 54 that plaintiff is a party to the said agreement.

9. Exhibit B, which is prepared and published by the MEBA, attached to the original complaint and incorporated herein by reference and made a part hereof, shows on its face at page 41 that plaintiff is one of the independent companies, parties to the standard Atlantic and Gulf Coast dry cargo and passenger ship agreement.

10. In June 1957 the MM&P and the MEBA agreed with the Committee for Companies and Agents to an increase in wages amounting to approximately 6% effective as of June 16, 1957.

11. In accordance with its usual practice of long standing plaintiff offered to sign with the MM&P and the MEBA an amendment to its existing collective bargaining agreement granting respectively to its licensed deck officers and its licensed engineer officers the same increase as had been agreed to between the Committee for Companies and Agents and the MM&P and the MEBA but the defendant Unions refused to sign the negotiated agreement with plaintiff.

12. The MM&P and the MEBA are labor organizations representing supervisory personnel and the members of the defendant Unions are not employees within the meaning of the Labor Management Relations Act of 1947, as Amended.

13. On August 21, 1957 while the SS Frances and the SS Kathryn, each owned and operated by the plaintiff,

were moored at plaintiff's terminal in Brooklyn, New York, the MM&P and the MEBA each called a strike against plaintiff in violation of their respective collective bargaining agreements and the individual defendants, without warning to plaintiff, caused these two vessels and the property of plaintiff to be picketed and said property and vessels are now being picketed.

14. The said picketing of the SS Frances and the SS Kathryn, which vessels have large quantities of perishables aboard, prevented their cargoes from being unloaded.

15. The said picketing has caused stoppages of work and is in violation of the written collective bargaining agreement which the MM&P and the MEBA each has with plaintiff and is not the result of a labor dispute as that term is defined by Section 876-a of the Civil Practice Act of New York.

16. Plaintiff is in full compliance with all the terms of its collective bargaining agreements with both the MM&P and the MEBA and plaintiff has not refused to comply with any of the terms of said agreements.

17. The defendants have no legal right to cause stoppages of work by picketing plaintiff's property or its vessels as such picketing is causing stoppages of work in violation of the terms of the existing collective bargaining agreements between the plaintiff and the MM&P and the plaintiff and the MEBA.

18. The classifications of persons represented by the MM&P and the MEBA being supervisory personnel, the said picketing is not the result of a labor dispute as that term is defined in the Labor Management Relations Act of 1947, as Amended.

Exhibit C, Annexed to Affidavit of Lee Pressman

19. The action taken by defendants in causing the property and vessels of the plaintiff to be picketed has caused and is causing plaintiff serious loss, damage and irreparable injury, for which plaintiff has no adequate remedy at law in that plaintiff has lost and will continue to lose the business of its regular customers who, but for the aforesaid picketing, would be engaging plaintiff's vessels for the transportation of cargoes and that if said picketing is not immediately restrained perishable commodities presently aboard the SS Frances and the SS Kathryn will be destroyed.

20. Delay in granting the coercive relief herein prayed for would result:

(a) In the continued and continuing repetition of the unlawful act of picketing with no proper justification.

(b) In the continued and continuing irreparable loss and damage to plaintiff as well as to its tangible and intangible property.

(c) In the continued and continuing repetition of the unlawful acts herein described against which plaintiff has no adequate remedy at law.

(d) In greater injury to plaintiff than will be inflicted upon defendants by the granting of relief sought.

(e) In the continued and continuing irreparable loss and damage to plaintiff as well as to its tangible and intangible property against the loss and damage to which the public officials charged with the duty to protect plaintiff's property would be unable to furnish adequate protection in that the

Exhibit C, Annexed to Affidavit of Lee Pressman

acts of defendants have not been riotous, disorderly or outwardly destructive.

WHEREFORE, plaintiff respectfully prays that this Court issue an appropriate Order temporarily and permanently restraining and enjoining the individual defendants and the defendant Union and all of its officers, representatives, agents, servants, employees, attorneys and all members or persons acting in concert or participation with it, (a) from breaching or otherwise violating the present collective bargaining agreement between plaintiff and defendant Unions, and (b) from engaging in or inciting any strike or work stoppage, or by picketing or by issuing, directly or indirectly, any orders, directions, instructions, appeals or by any like or related acts or conduct or by permitting any such to remain in existence or effect, otherwise preventing or interfering in any way with the discharging, loading, moving or operating of the SS Frances, the SS Kathryn, or any other vessel owned or operated by the plaintiff, A. H. Bull Steamship Company, so long as the present collective bargaining agreement between the parties remains in effect, and for such other and further and different relief as in the premises may be deemed necessary, adequate and proper.

SATTERLEE, BROWNE & CHERBONNIER,
Attorneys for Plaintiff,
Office and P. O. Address,
30 Broad Street,
New York 4, New York.

(Verified by Milton Williams, September 4, 1957.)

Exhibit D, Annexed to Affidavit of Lee Pressman

Form 91

MEMORANDUM

SUPREME COURT

KINGS COUNTY

(SPECIAL TERM, PART I)

By BROWN, J.

A. H. BULL STEAMSHIP COMPANY,

vs.

THOMAS ATKINS as President of the INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS, INC. et al., etc.

Dated September 19, 1957

Plaintiff moves for an injunction pendente lite in an action arising out of the breach of a collective bargaining agreement.

Defendants cross-move to dismiss the amended complaint upon the ground of insufficiency and upon the further ground that the complaint fails to comply with the requirements of Section 876a of the Civil Practice Act.

This court has already determined that this case is a "labor dispute" as that term is defined in said section (Decision of Cone, J., N. Y. L. J. 9/5/57, p. 9, col. 8). By the same decision the original complaint was dismissed with leave to amend on the ground that the requirements of subdivisions 1 and 4 of Section 876a had not been complied with.

Affidavit of Charles T. Atkins

The allegations of the amended complaint now meet the requirements of that section (*Carroll Towing Co. v. Bradley*, 91 N. Y. S. (2) 431 (not otherwise reported), affd. 275 App. Div. 1022). Accordingly, the cross-motion to dismiss the amended complaint is denied.

The hearing required by Section 876a shall be held before Official Referee John MacCrate.

Settle order on notice.

J. S. C.

Affidavit of Charles T. Atkins

(Record, pp. 102-107)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

CHARLES T. ATKINS being duly sworn deposes and says:

Since 1952 I have been the International President of the International Organization of Masters, Mates & Pilots, erroneously sued herein as International Organization of Masters, Mates & Pilots, Inc., AFL-CIO, which is a Union representing ninety percent of the Licensed Deck Officers employed aboard American Merchant Marine vessels.

I have represented our Organization in labor negotiations since 1946.

This affidavit is submitted in opposition to plaintiff's motion for a temporary injunction and in support of defendants' cross motion to dismiss the complaint.

A. H. Bull & Co., Inc., is a common carrier engaged in the transportation of goods at sea.

Affidavit of Charles T. Atkins

The plaintiff erroneously states that during the past seven years it has been mutually understood and agreed between plaintiff and defendants that the terms of any Collective Bargaining Agreement agreed upon between defendants and American Merchant Marine Institute, (an employer association composed of Atlantic and Gulf Coast steamship companies, hereinafter referred to as AMMI) would become the Agreement between the plaintiff and the International Organization of Masters, Mates & Pilots (hereinafter referred to as MMP). While it is true that the plaintiff is not a member of the AMMI and has therefore, never participated in the formulation of the language of the Agreements, there has never been any mutual understanding that the plaintiff and the defendants were bound by the AMMI Collective Bargaining Agreement although the AMMI contract was adopted by the plaintiff. On at least two occasions the plaintiff granted benefits to defendants which were greater than those contained in the AMMI Collective Bargaining Agreement. In 1951, the plaintiff granted an increase of 25¢ per day per Licensed Deck Officer to the plaintiff's contribution to the Pension & Welfare Plan. This increase was not in effect with any of the AMMI companies.

Also, in the latter part of 1955 the plaintiff recognized MMP as Collective Bargaining representative for the masters employed aboard plaintiff's vessels. There is no requirement under the AMMI Collective Bargaining Agreement for such recognition. Paragraph four of the complaint is in error in alleging that defendant's agreement with the plaintiff covers employment relations of licensed deck officers excluding masters. All of defendant's members covered by the contract are supervisors.

If the plaintiff had participated in the formulation of the language of the AMMI contract, it would know that during the Collective Bargaining Sessions the contract between MMP and Pacific Maritime Association (the West

Coast counterpart of the AMMI, hereinafter referred to as PMA) is frequently referred to as a basis for comparison of provisions.

The AMMI Collective Bargaining representative, and our negotiating committee are fully familiar with the provisions of the PMA Collective Bargaining Agreement (Exhibit B). Omissions or differences are always discussed at considerable length and any differences remaining are intentional.

The issue of whether or not to include arbitration and it accompanying no strike provision under the wage review as provided in the AMMI Collective Bargaining Agreement has been discussed on many occasions. The omission of the provisions was not an oversight. The question of whether or not to adopt the PMA provisions was discussed by both the AMMI representatives and the Union's representatives; particularly your deponent. In fact a compromise was reached in the case of vessels of power tonnage of 25,000 tons and over or vessels with a new type power plant, (see Pg. 7 of Collective Bargaining Agreement, attached hereto as Exhibit A). It was specifically agreed that "in the event of disagreement in negotiations said issue shall be submitted to arbitration * * *." We certainly would never have included this provision if the general arbitration clause which contains the no strike provision in the Collective Bargaining Agreement was intended to cover contract changes.

The other monetary issue which would require changing the contract concerned the daily rate of employer contributions to the Pension & Welfare Plan (See Section 36 of Exhibit A). On this issue, the MMP, during negotiations demanded the right to review the daily contributions during the life of the Collective Bargaining Agreement. However, the AMMI insisted that there be no review. Thereupon the MMP requested the same provision as in the case of vessels with a power tonnage in excess of 25,000 tons

i.e., arbitration, but the employer remained adamant and the MMP finally accepted the following contract provision. "There shall be no reopening on contributions to said Plan prior to September 30, 1958."

The no strike agreement is only an agreement not to strike solely over those matters referable to arbitration under the grievance provision of Section 3. These are "all disputes relating to the interpretation or performance" of the Agreement.

Under its agreement MMP is not obligated to furnish officers to plaintiff. On the contrary, the agreement in Section 2(m) merely provides that plaintiff, shall obtain officers below the rank of Master and Chief Mate through the offices of defendant. If defendant fails to supply men for positions of Second and Third Officers, plaintiff can get them elsewhere. Defendant does not guarantee to make its members work. Defendant has never refused, and plaintiff does not claim that defendant has refused to give clearance to officers hired by defendant.

Under the terms of the present Collective Bargaining Agreement between the plaintiff and the MMP, the MMP is entitled to a wage review upon tendering 60 days prior written notice. The MMP served notice for a wage review in accordance with the aforesaid terms of the Collective Bargaining Agreement. Thereafter, the plaintiff and the representatives of the MMP, including your deponent, met in order to negotiate a proper wage increase. Despite the earnest negotiations of the MMP, and the presentation by your deponent of a specific written demand, no agreement could be reached. Thereafter, on August 20, 1957, the defendant commenced to picket plaintiff, maintaining a single picket patrolling each of two gates owned by plaintiff steamship company. The pickets have carried signs requesting the general public to take a handbill offered by the picket. The handbill contains an explanation that the dispute is solely with the plaintiff steamship company and

that defendant has no complaint or difference with any other employer who may be doing business with plaintiff steamship company.

Deponent denies the assertion by Milton Williams in his affidavit that no specific wage demands were made by defendant, that "job security" was discussed and that defendant insisted it had no real dispute with defendant. Defendant clearly stated to plaintiff that it demanded an increase in excess of 6% because of the likelihood of its members' jobs being terminated. No amount was specified only because plaintiff flatly refused to discuss such an increase and made it clear it would not agree to an increase of 7% or even 6½%. The dispute was not referred to arbitration because plaintiff and defendant could not agree on the terms and scope of an arbitration.

Deponent denies that MMP ordered its members to respect and support the seamen's picket lines and to cease all work aboard plaintiff's vessels. To the contrary, when the seamen commenced striking defendant's members continued working in compliance with Section 3(f) of the contract. This provides:

> "It is understood that in the event a picket line is established against any vessel, the Licensed Deck Officers of such vessel will report and perform all of their normal duties incidental to the security of the vessel, passengers and cargo, provided that no Licensed Deck Officer shall be required to work under conditions which may endanger his health or safety. The Organization undertakes to use its best efforts to obtain clearance for such purpose from the Union establishing the picket line."

This provision requires the Licensed Deck Officers to perform the duties of the security of the vessel, passengers and cargo and this was done. The provision does not re-

quire the Officers to continue working indefinitely behind a picket line. These obligations cease once they have attended to the security of the vessel, passengers and cargo.

In San Juan, Puerto Rico, defendants' members also fulfilled all obligations under Section 2(f) before leaving the vessels. In fact, the Masters remained aboard even though they are members of the Organization. Section 2(f) does not require defendants' members to discharge cargo and sail vessels which are being struck.

Plaintiff refers to an order of Judge Bruchausen which enjoins the strike of the unlicensed seamen "and all persons in active concert or participation" with it. Plaintiff has alleged not a shred of evidence in support of any contention that defendant has been in "active concert or participation" with the unlicensed seamen. Plaintiff's own complaint shows a history of contracts and independent labor disputes. Defendant is an independent Organization. If plaintiff really believed it could prove such a contention it would have attempted to have defendant cited for contempt of the order, rather than bring this independent action.

WHEREFORE, your deponent respectfully prays that the plaintiff's application for an injunction be denied, and defendants' cross-motion to dismiss complaint be granted.

/s/ CHARLES T. ATKINS

(Sworn to October 8th, 1957.)

Exhibit A, Annexed to Affidavit of Charles T. Atkins

ATLANTIC AND GULF COAST

MASTER

DRY CARGO AND PASSENGER AGREEMENT

between

INTERNATIONAL ORGANIZATION MASTERS,
MATES AND PILOTS, INC.

and

DRY CARGO AND PASSENGER COMPANIES

Effective Date July 16, 1955

(Copies of this Exhibit will be handed up upon argument)

Exhibit B, Annexed to Affidavit of Charles T. Atkins

AGREEMENT

between

PACIFIC MARITIME ASSOCIATION

and

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS INC.

West Coast Local No. 90, A F of L

covering

INTERCOASTAL OFFSHORE AND ALASKA TRADES

Effective Date October 1, 1953

(Copies of this Exhibit will be handed up upon argument)

Affidavit of Marvin Schwartz

(Record, pp. 84-101)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARVIN SCHWARTZ, being duly sworn deposes and says:

I am the attorney for defendant International Organization of Masters, Mates & Pilots, sued herein as International Organization of Masters, Mates & Pilots, Inc. (hereinafter called MMP) and submit this affidavit in opposition to plaintiff's motion for an injunction *pendente lite* and in support of the cross-motion to dismiss the complaint.

This action is not governed by the decision made in plaintiff's suit against Seafarers' International Union of North America, Atlantic & Gulf Districts since that action concerned a collective bargaining agreement containing different provisions and concerned employees, not supervisors.

PEACEFUL PICKETING CANNOT BE ENJOINED

The complaint alleges a two-fold jurisdiction of this Court. One is based upon diversity of citizenship and the other upon Section 301 of the Labor Management Relations Act of 1947. Deponent contends that if jurisdiction is based upon diversity of citizenship, this Court cannot issue an order restraining any person or persons participating or interested in a labor dispute from ceasing or refusing to

perform any work, or from giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence. Norris-LaGuardia Act, 29 U. S. C. 101 et seq. Under this Act peaceful picketing in a labor dispute cannot be enjoined. Since the complaint fails to allege that the picketing is other than peaceful, it fails to state a claim upon which relief can be granted. Even if it does state a claim, Norris-LaGuardia requires this Court to hold a hearing before granting an injunction.

Deponent further submits that the complaint fails to state a claim under Section 301 of the Labor Management Relations Act of 1947. Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

This Section authorizes a suit against the defendant only if it is "a labor organization representing employees in an industry affecting commerce." Deponent submits that defendant is not a labor organization and does not represent employees.

AN ORGANIZATION OF SUPERVISORS IS NOT A LABOR ORGANIZATION WITHIN THE NATIONAL LABOR RELATIONS ACT

The term "labor organization" is defined in Sec. 2(5) of the Labor Management Relations Act which reads as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan *in which employees participate* and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Emphasis ours.)

The term "employee" is defined two paragraphs above in the same Section. This definition, Sec. 2(3), reads as follows:

> "The term 'employe' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any person having the status of an independent contractor, *or any individual employed as a supervisor,* or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as defined herein." (Emphasis added.)

It is, therefore, apparent on the face of the language contained in Sec. 2 (3) set forth above, that certain types of employees are specifically excluded from coverage by the Act. Agricultural workers, domestics, independent contrac-

tors, employees subject to the Railway Labor Act, and *individuals employed as supervisors*, are all specifically excluded.

Further along in Sec. 2, the term "supervisor" is defined. Sec. 2 (11) reads as follows:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment."

The jobs represented by defendant MMP aboard plaintiff's vessels are Master (Captain), Chief Officer, Second Officer and Third Officer. These seagoing officers exercise their authority aboard ship pursuant to licenses granted to them by the U. S. Coast Guard. Along with the defendant, MEBA, they have traditionally been recognized as one of the large supervisory groups who are organized into associations maintaining collective bargaining agreements with their employers. The fact that the members of respondent MMP are clearly supervisors, was quickly utilized by employers. In *NLRB* v. *Wyandotte Transporation Co.*, 166 F. (2d) 434 (CA-6; 1948), the Board had ordered the responded Wyandotte to cease and desist from its unfair labor practices against the MMP. In June of 1947, the Court of Appeals for the 6th Circuit entered a decree enforcing the order of the Board. Several months later, the Taft-Hartley Amendments became effective and the respondent petitioned the Court for a re-hearing. On the basis of the fact that MMP represented supervisors and, therefore, was no longer under the Act, the Court set aside its prior decree of enforcement.

Shortly thereafter, in *Globe Steamship Co.*, 85 NLRB 474 (1949). the members of the defendant MEBA were held to be supervisory employees and outside of the Act. The following excerpts from the Board's Opinion are helpful:

> "This evidence discloses that considerable responsibility is delegated to the assistant engineers by virtue of their accountability for specific items of machinery, and through their position as the heads of the engine department watches. Their responsibilities, moreover, are accompanied by a commensurate degree of control over unlicensed personnel. Thus, the record shows that assistant engineers can make effective recommendations to the chief engineer with respect to the hire, discharge, disciplining, and promotion of the unlicensed engine department personnel, and the settlement of their grievances. Indeed, the record indicates that the power to settle grievances are sometimes exercised by them directly without the intervention of the chief engineer.
>
> "A power to command, moreover, stands further as the most fundamental and most frequently used of the supervisory powers possessed by the assistant engineers. Such a power is in fact inherent in their status as licensed ship's officers. It manifests itself conspicuously during their twice-daily watches as a power responsibly to direct the work of the unlicensed personnel,—for without their command power, there would be no controlling head during these watches, since only in the unusual cases does the chief engineer take over.[15]

[15] Federal statutory law has a direct bearing upon the status of assistant engineers on Great Lakes vessels; Assistant engineers in charge of watches must be licensed by the U. S. Coast Guard, and are "officers" (46 U. S. C. A. Secs. 221, 222, and 224). A licensed officer, before entering upon his duties, must take oath that he will

> "The inherent command function of the assistants is further emphasized in the practice whereby each succeeds to the position of head of the engine department when the officer next highest in rank is absent or incapacitated.
>
> "The record shows that the exercise by the assistant engineers of the supervisory powers described above requires that they use independent judgment in evaluating the performance and capabilities of the unlicensed personnel, and in coping with the varied situations arising in the engine department—many of which are directly related to the safety of their vessels and fellow crew members. The fact that assistant engineers may frequently be called upon to perform considerable manual labor is not incompatible with their possession of supervisory powers."

Even where the Masters, Mates & Pilots voluntarily submitted itself to the jurisdiction of the National Labor Relations Board, the Board has held that it has no jurisdiction. The following excerpts from the Board's Opinion, *Wilson Transit Co.* v. *Masters, Mates & Pilots*, 80 NLRB 1476 (1948), is authority for this.

> "(3) The petitioner seeks in each case a unit composed of licensed pilots who sign on as mates, on all ships owned and operated, and on all ships operated but not owned, by each of the Companies. The petitioner contends that the employees sought are not supervisory professional employees. The

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faithfully and honestly perform all the duties required of him by law (46 U. S. C. A. Sec. 231). For negligence, unskillfulness, willful violation of law, or refusal to perform official duties while employed on a vessel, an officer's license may be suspended or revoked. (46 U. S. C. A. Sec. 229 and 240). (Ed. note: 46 U. S. C. A. Sec 221, 222 and 224 applies to *all* licensed officers aboard *all* merchant vessels.)

employers contends that such unit is inappropriate since they do not employ any pilots as such; that the employees for whom the petitioner would bargain collectively are mates who are qualified to serve as pilots, and that these individuals are supervisors within the meaning of the Act. The employers have no history of collective bargaining with respect to the employees sought herein.

"At the beginning of the shipping season in early Spring, the mates, who report from 3 to 10 days before the Master, are required to make the vessels ready for official inspection and navigation. As part of such duties they may be called upon to hire certain unlicensed crew members in order to complete the ship's complement of personnel, without which the vessel would not receive its certificate of inspection from the United States Coast Guard. The first mate takes charge of the work and assigns certain tasks to the other mates. Each mate is responsible for the work of the crew members assigned to him and for the satisfactory completion of the work. When the ship is ready to leave port, the Master comes aboard and takes charge. The mates are then required to stand watch, and the Master delegates to the mates the duties of maintaining and providing for the upkeep of the vessel. In the absence or incapacity of the Master, the First Mate assumes complete control over the vessel. Should the First Mate also be absent or be incapacitated, the Second Mate takes charge, and in corresponding circumstances, the Third Mate will take command of the ship."

Further, in *Colle Towing Co., Inc.*, 85 NLRB 899 (1949), the Board held Mates to be supervisors even when serving

on board tug boats. Personnel aboard tug boats are not required to be licensed and, therefore, the employer claimed no one was a supervisor. The Board, nevertheless, held Mates to be supervisors, referring to the fact that they are traditionally recognized as supervisors. The opinion of the Board reads, in part, as follows:

> "Although the record shows clearly that the captain aboard each vessel exercises supervisory authority, not only in the direction of the vessel, but in the authority to discharge or recommend effectively the discharge of personnel, the record does not clearly establish the status of mates and engineers. However, it is clear that mates and engineers, although unlicensed, perform the same duties as licensed personnel in similar classifications. Such personnel have been regarded both traditionally and by the Board as officer personnel, and the Board has recognized that their interests are substantially different from those of other employees aboard a vessel. Under the circumstances, we are of the opinion that captains, mates and engineers should be excluded from the unit hereinafter found appropriate."

With regard to the various criteria set forth in the definition of supervisor, it is important to remember that a person need not fulfill all of the requirements of the definition in order to be so classified. In *Ohio Power Co.* v. *NLRB*, 176 F. (2d) 385 (CA-6; 1949), the Court said that qualifications established in the definition of supervisor are applicable in the disjunctive. The same Court in *NLRB* v. *Budd Mfg. Co.*, 169 F. (2d). 1571 (CA-6; 1948), held that in order to be classified as a supervisor, an individual need only have one or more of the types of authority specified, *not all of them.* Further it has been held that the status of supervisor depends upon the *exist-*

ence of the authority, and not upon the frequency with which it is exercised. *NLRB* v. *Quincy Steel Casting Co., Inc.*, 200 F. (2d) 293 (CA-1; 1952). It has also been held that persons in supervisor classifications were supervisors even though they did not yet have subordinates. *Peter Kewit Sons Co.*, 106 NLRB 30 (1953).

In *DiGiorgio Fruit Corp.* v. *NLRB*, 191 F. (2d) 642 (CA-5; 1951), the specific problem of the applicability of the secondary boycott, and other unfair practices by labor organizations, was carefully analyzed. This case involved an organization of agricultural employees. Referring to the definition of the term "employees" at pages 2-3, supra, we note that agricultural employees are specifically excluded as well as supervisors. Obviously the Court's argument is applicable to all excluded classes.

A complaint had been issued by the General Counsel of the Board charging a local Union, designated as Farm Union, with violating the secondary boycott provision of Sec. 8(b) 4(A). The General Counsel's office contended that the Farm Union was a "labor organization" within the meaning of the statute, even though its members did not come within the definition of employees as contained in Sec. 2(3) of the Act. The National Labor Relations Board rejected this contention and never even reached the question of whether or not the activities of the Farm Union constituted a secondary boycott. The Board held that the statute did not apply to the Farm Union. Thereupon, the General Counsel appealed to the Court.

The Court quoted Sec. 8(b) 4(A) of the Act as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> " * * *
>
> "(4) * * * to induce or encourage the employes of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * *

transport, or otherwise handle or work on any * * * commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

In analyzing the meaning of this statutory language the Court said:

"The first consideration upon this point is quite simple, a matter of statutory language. The statute, as will be noted from the above quotation, relates to an unfair labor practice of 'a labor organization or its agents.' That is, the only unfair labor practices to which the statute applies are such practices of 'a labor organization or its agents.'

"Section 2 of the Act contains statutory definitions. It provides, among other things:

"'Sec. 2. When used in this Act—

"' * * *

"'(3) The term "employee" shall include any employee, * * * but shall not include any individual employed as an agricultural laborer, * * *.

"' * * *

"'(5) The term "labor organization" means any organization of any kind * * * in which employees participate * * *.'

"Thus, according to the language of the Act, 'employees' must participate in an organization if it is to be deemed a labor organization within the meaning of the statute, and agricultural laborers are

> not included within the statutory term 'employees'. Hence, so far as the words of the statute are concerned, the Farm Union, being composed exclusively of agricultural laborers, is not a labor organization within the meaning of the statute, and so a secondary boycott by the Farm Union would not fall within the prohibitions of the statute."

After the above analysis the Court considered carefully certain questions of legislative intent which are applicable only to agricultural employees. Apparently there is a substantial amount of legislative history indicating that the secondary boycott provision of the statute had as one of its prime objectives the protection of farmers. However, the clear statutory language was held to override this argument.

Further, the Court referred, with approval, to the opinion of the Board which was based upon an analysis of all the provisions of Sec. 8(b) of the Act, dealing with other unfair labor practices. The Board reasoned that to include associations of agricultural laborers within the definition of "labor organization" under Sec. 8(a) and 8(b) would be incongruous with the exclusion of such workers from the definition of "employee" contained in Sec. 2(3). The Court upheld the Board's reasoning as follows:

> "Section 8(b) of the Act, from which we have quoted in part, and which makes illegal an unfair labor practice of a labor organization, includes not merely the clause relating to secondary boycotts but contains six paragraphs dealing with other practices or acts. These other paragraphs do not seem to refer to organizations of agricultural laborers. The Board says that this meaning is obvious because, if these other paragraphs were applicable to organizations of agricultural laborers, the exclusion of such la-

borers from the definition of 'employee' would be completely wiped out. Thus, for example, the first paragraph declares that it shall be an unfair labor practice for a labor organization to restrain or coerce employees from the exercise of the rights guaranteed in Section 7 of the Act, and Section 7 is the section which declares that 'Employees shall have the right to * * * bargain collectively through representatives of their own choosing'. The incongruity and conflict resulting from giving the term 'employees' its statutory defined meaning, excluding agricultural employees, but at the same time giving the term 'labor organization' a non-statutory meaning so as to include agricultural laborers through Section 8(b), is emphasized by the Board. Moreover, the Board points out that Section 8(a), which makes illegal an unfair practice by employers, and thus bestows rights and benefits on employees, uses the term 'labor organization' throughout. We think that the section conferring benefits (Section 8(a) and the section imposing restrictions (Section 8(b)), which are sub-divisions of the same section of the Act, must be construed in harmony; and that, if they be construed to apply to organizations of agricultural laborers, they would nullify the exclusion of such laborers from the statutory definition of 'employees'."

Further along in its opinion, the Court makes clear that it considers agricultural employees to be outside of the purview of the Act both as to privileges and restrictions. The Court said:

"At the same time, it seems indisputably clear that Congress did not intend to include within either the

benefits or the restrictions of the Act, organizations composed exclusively of agricultural laborers."

* * *

"The problem can readily be presented again to the Congress for its determination. The ultimate problem whether secondary boycotts by agricultural laborers should be forbidden is for the Congress and not for the courts. We cannot decide what ought to be done in such a matter; our function is merely to ascertain what Congress has already done."

It is thus apparent that organizations of all people who are excluded from the definition of "employee" are not labor organizations within the purview of Secs. 8(a) and 8(b). This is further supported by the legislative history of the Act concerning supervisors. House Report No. 245 on HR 3020 states that the Bill deprives the Board of jurisdiction over supervisors. House Minority Report No. 245 on HR 3020 objected to the exclusion of supervisory employees and stated that withdrawing recognition of the rights to organize and bargain collectively and with it the orderly machinery for achieving organization would not eliminate unionism among supervisors. The Report said "it will force them instead to the alternative of economic self-help * * *."

In the discussion in the House, it was also made clear that the supervisors do not have the benefits of the Act and are also excluded from the restrictions of the Act. They are left to all of the self-help remedies which existed prior to the passage of the Wagner Act. The following excerpts from the Congressional Record, House, April 15, 1947 are illustrative:

Question by Mr. Crawford, "Does the Bill provide for any kind of union for foremen or supervisors?" Answer by Mr. Gwynn, "It does not; it simply ex-

cludes them so that supervisors or foremen may organize as they did before the Wagner Act, but they have no standing under this Bill."

Representative Klein of New York, referring to the excluded supervisors said, "If they desire to organize against the employers' will, their only weapon will be to resort to the strike, the very result which the Wagner Act was intended to avert."

Senator Taft, in discussing this question in the Senate, Congressional Record, Senate, April 23, 1947, said in relation to supervisors, "They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." Senator Johnson of South Carolina said, Congressional Record, Senate, May 2, 1947, "* * * I find it equally difficult to see why these employees should not be held to the same high standing of conduct which would be required of organized labor by the provisions of this Bill. Now, if there is a union of supervisors I believe that their interests should equally be protected by law and that these unions should be held to the same degree of responsibility as other unions."

Therefore, it was made clear from the discussions prior to the passage of the Act that supervisory employees are excluded from all provisions of the Act, both those granting privileges to labor organizations and those placing restrictions upon them.

Affidavit of Marvin Schwartz

SECTION 301 AUTHORIZES SUITS AGAINST LABOR ORGANIZATIONS ONLY FOR VIOLATIONS OF CONTRACTS COVERING EMPLOYEES

Although defendant clearly is not a labor organization, defendant further contends that Section 301(a) does not grant jurisdiction or give a cause of action against defendant, even assuming that defendant be held to be a labor organization. There is a distinction between the language used in Section 301(a) and that in Section 8(b) which refers to unfair labor practices. Section 8(b) states:

> "It shall be an unfair labor practice for a *labor organization* or its agents—" (Emphasis supplied)

whereas Section 301 clearly refers to "a labor organization *representing employees.*" (Emphasis supplied.) The distinction in language must have some meaning. Section 301 obviously means that there may be some organizations which are labor organizations because they represent employees as well as non-employees or supervisors. Such an organization could be sued under Section 301 only for violating a contract covering employees. Even if it should be determined that defendant is a labor organization, it does not here represent employees, but represents only supervisors in relation to plaintiff. Therefore, it is submitted that Section 301 does not support the plaintiff's complaint and plaintiff has failed to state a claim upon which relief can be granted.

THERE IS NO BREACH OF CONTRACT BECAUSE UNDER THE COLLECTIVE BARGAINING AGREEMENT THE MMP MAY STRIKE IN CONNECTION WITH AUTHORIZED WAGE REVIEWS

It is further submitted that defendant has not breached its contract with plaintiff because under the collective bar-

gaining agreement the MMP may strike in connection with authorized wage reviews.

Section 1(c) of the Collective Bargaining Agreement (Exhibit A annexed to affidavit of Charles T. Atkins) provides:

> "During the life of the Agreement either party may request two wage reviews upon 60 days prior written notice provided, however, that no wage review shall be held prior to September 30, 1956. Said wage review may include general wages, overtime and penalty rates, and additional compensation for Masters and non-watchstanding Licensed Deck Officers and the rate for Relief Deck Officers."

The labor dispute in question arose out of a wage review requested by MMP upon 60 days prior written notice and was subsequent to September 30, 1956. The wage review covered no items not specified in Section 1(c). The Contract affords the MMP only one method of settling labor disputes arising out of the wage review—the strike. No provision is made for arbitration of a wage review dispute. The general contract provision which provides for arbitration is Section 3, entitled "Grievance Procedure and Arbitration." It provides for *arbitration of disputes relating to the interpretation and performance*[1] *of the Agreement and provides* that there shall be no strikes, lockouts or stoppages of work over grievances for which arbitration machinery is provided. This refers not to all possible disputes between the parties but to those concerning the meaning of the Contract. The only no strike agreement is con-

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[1] Webster's New Collegiate Dictionary defines interpretation and performance as follows:

Interpretation: Explanation, construction, or sense given by an interpreter.

Performance: The execution of the functions required of one.

tained in the Grievance and Arbitration Section. It is not in any of the general introductory sections and is not specified in connection with the wage review. It obviously is applicable only to those disputes covered by Section 3. These are the grievances which arise aboard ship and relate to the normal ship routine, disputes between an individual or a group of employees and the company about unlawful discharge, hours of labor in port, port time arrival and departure, work between the hours of 5:00 p.m. and 8:00 a.m., work by Licensed Deck Officers after midnight, hours of labor at sea, confinement of officers to vessel in port, posting of sailing time, disputes as to overtime and penalty time, etc. The grievance machinery was developed for these disputes, and not to determine wage reviews.

That Section 3 does not apply to all disputes is shown by the following cases in which similar language has been construed.

In *The Matter of Marchant* v. *Mead Morrison Mfg. Co.*, 252 N. Y. S. 284, 169 N. E. 386 (1929), an arbitration clause had the following language:

> "If for any reason any controversy or difference of opinion which arises as to the construction of the terms and conditions of this contract or as to its performance, it is mutually agreed that the matter in dispute shall be settled by arbitration . . . ."

In construing this language Judge Cardozo said at pages 299-300:

> "The Clause to be interpreted is instinct with tokens of a purpose to encompass the submission with limitations and conditions. *It does not say that any and all controversies growing out of the contract shall be settled by arbitration.* The submission is to be confined to controversies or differences of opinion as to 'the construction of the terms and conditions' of the

contract, and controversies or differences as to the 'performance' of the contract. Each of these phrases is to be weighed in association with each other • • • The words 'as to performance' do not stand in isolation. If they had been understood to cover everything, there would have been no sense in providing for arbitration as to the meaning or construction of the 'terms and conditions' • • •

"We think there was no intention to clothe the arbitrators with power to settle every difference having its genesis in the contract. Their function was more modest. Questions might arise as to the meaning of the contract or the plans and specifications. The arbitrators were to give the answer. Questions might arise as to the performance of covenants and conditions where there was no doubt as to the meaning. Again the arbitrators would answer." (Emphasis supplied.)

Even if the language in the present contract referred only to "all disputes", cases have held that this language is not sufficient to render all disputes subject to arbitration. In the case of *In re Amsterdam Dispatch* 254 App. Div. 233, 4 N. Y. S., Supp. 2d 908, the Contract provided:

"should any difference arise between employer and employee, the same shall be submitted to arbitration by both parties."

The Court said:

"These arbitration provisions when read with the provisions of paragraph 13 that 'during that time (the term of contract) there shall be no revision or modification of this agreement' must be held to be limited to 'any difference • • • between employer and

> employee' concerning the construction effect or performance of the contract. It should not be extended to allow either party to invoke arbitration to create a contract for them."

There is one other instance wherein the Collective Bargaining Agreement provides for the use of arbitration. This is Section 9 which makes arbitration applicable to one specific type of wage dispute. This involves only wage disputes concerning vessels of 25,000 tonnage or over or vessels with a new type of power plant. This Section provides:

> "Section 9—Wages * * * When vessels of power tonnage of 25,000 tons and over or vessels with a new type power plant are put into operation the Organization shall have the right to raise the issue of the wages to be paid to the Licensed Deck Officers aboard said vessels and in the event of disagreement in negotiations said issue shall be submitted to arbitration in accordance with the provisions of Section 3."

Thus, whenever the parties to the Contract intended to make a dispute subject to arbitration, they have done so specifically. The absence of a reference to arbitration in connection with the wage review and the specific reference in connection with ships of 25,000 tons and over and vessels with a new type of power plant shows an intent not to submit the wage review to arbitration. When the parties wanted arbitration they knew how to say so specifically.

There is no agreement not to strike in connection with the wage review. Since arbitration is not provided, the strike is the only means available to the Union in a wage review dispute.

In this connection it is interesting to note the MMP Agreement with the Pacific Maritime Association, which covers the West Coast. (Exhibit B appended to affidavit

of Charles T. Atkins). This Agreement in language almost identical with that of the Contract with Bull Lines provides for a wage review. It then specifically and clearly provides for the applicability of the Grievance Procedure and Arbitration when a dispute arises as the result of the wage review.

This Agreement provides in Section 1:

> "Either party to the agreement may request two wage reviews upon sixty (60) days prior written notice, provided, however, that no wage review shall be held prior to June 15, 1956. Said wage review may include general wages, overtime and penalty rates, the additional compensation for Master and non-watchstanding Licensed Deck Officers and the rate for Relief Deck Officers. The provisions of Section 3 shall be applicable in the event of disagreement at the time of Wage Review. (Amended August 3, 1955.)
>
> "If no agreement is reached through negotiations in thirty (30) days after receipt of such notice of review, the issues shall be referred to arbitration. The arbitrator's decision shall be rendered by the review date, and shall take effect at 12:01 A. M. on the day following the review date."

Thus the West Coast Agreement substitutes arbitration for the right to strike in wage review disputes. This was not done in the case at bar. Without the right to strike and without arbitration, a wage review would be meaningless. The West Coast Agreement provided for arbitration of wage review disputes as far back as 1953, two years prior to the execution of the instant contract. The contents of the West Coast Agreement were known to the negotiators of the instant contract, but the arbitration reference was specifically omitted.

There are three instances in the contract where matters not relating to interpretation and performance of the contract are involved. In addition to the general wage review provided for in Section 1 the wage scale for vessels of power tonnage of 25,000 tons and over or vessels with a new type power plant, provided for in Section 9 already discussed, a monetary reference is also made at Section 36 relating to pension and welfare contributions made by the employer. Here again the issue of changing this contractual provision was considered at the time the contract was negotiated. In this instance the AMMI was successful in obtaining the concession from the Organization that there would be no reopening on contributions in any manner—negotiation, arbitration or by strike.

A Preliminary Injunction Cannot Be Granted Where There is a Substantial Question of Law Or Fact

Plaintiff takes several inconsistent positions as to the nature of defendants' activities. It admits defendant is on strike in paragraph 9 of the complaint while in paragraph 12 it claims in effect that defendants' members stopped working because Seafarers' was striking. In the affidavit of Milton Williams it alleges that defendant is acting in concert or participation with Seafarers' International Union.

Deponent further submits that a preliminary injunction may not be granted where there is a substantial question of law or fact involved, whether or not the action concerns a labor dispute. New York Courts have recently reiterated this doctrine in the case of *Shenker Displays* v. *Goldman*, 144 N. Y. S., 2d 7 (1955). The Court there said:

"The drastic relief inherent in a temporary injunction may not be granted where sharp issues of fact

exist, *Geed* v. *Braunsdorf*, 277 App. Div. 1001, 1002, 100 N. Y. S. 2d 181, 182, or if the ultimate result is in doubt, *Gitlin Bay Co.* v. *Bresky*, 279 App. Div. 370, 107 N. Y. S. 2d 550."

Other cases sustaining this hornbook principle are, *Standard Library* v. *Addes*, 167 Misc. 469 and *Voorhees & Hobart* v. *Hobart*, 251 App. Div. 111.

In this action complex, factual and legal questions are raised as to whether defendant is a labor organization, whether it represents employees and whether there had been a breach of contract.

It is respectfully submitted that plaintiff has failed to state a claim under Section 301 of the Labor Management Relations Act of 1947 since defendant is not a labor organization representing employees; that the Norris-LaGuardia Act prohibits the granting of an injunction assuming this Court has jurisdiction based upon diversity of citizenship and that defendant has not breached its contract with plaintiff.

WHEREFORE, it is respectfully requested that plaintiff motion for an injunction *pendente lite* be denied and defendants' cross-motion to dismiss be granted.

MARVIN SCHWARTZ

(Sworn to October 9, 1957.)

Supplemental Affidavit of James V. Hayes

(Record, pp. 108-113)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES V. HAYES, being duly sworn, deposes and says:

1. I am a member of Donovan Leisure Newton & Irvine, who, with Messrs. Satterlee, Brown & Cherbonnier, are attorneys for the plaintiff A. H. Bull Steamship Co. herein. I make this affidavit in support of plaintiff's application for an injunction pendente lite and for the express purpose of putting before the Court certain considerations relevant to the anticipated position of the defendant unions that they are not "labor organizations representing employees in an industry affecting commerce" so as to be subject to suit under Section 301 of the National Labor Management Relations Act as amended (29 U. S. C. Section 185[a]).

2. We do not anticipate that any controversy in this regard will turn on whether Bull is engaged in "an industry affecting commerce" inasmuch as Bull is a prominent member of the American-flag ocean-going dry cargo shipping industry. It will be contended, I believe, that the defendant associations admit to membership and represent only supervisory employees within the meaning of the term "supervisors" as defined in Section 2(11) of the Act (29 U. S. C. Section 152 [11]).

Supplemental Affidavit of James V. Hayes

3. In regard to defendant International Organization of Masters, Mates and Pilots, Inc. ("MMP") two facts stand out at the outset:

(a) MMP's Constitution. Article 25, Section 1, specifically makes eligible to membership in MMP locals "any person employed in the maritime industry *not* working under the authority of a license." Upon information and belief, MMP has admitted, in the past, and presently admits non-supervisory personnel to membership and represents such members for collective bargaining purposes pursuant to this provision of its Constitution.

(b) Insofar as plaintiff Bull is concerned, the various ship captains (or "masters"), the officers who alone are responsible for the ships' operations, are expressly excluded from the bargaining unit administered by MMP. In other words, MMP represents, in the case of Bull, only the subordinate deck officers.

4. Similarly, I am informed, defendant Marine Engineers Beneficial Association ("MEBA" herein) also represents in various bargaining units throughout the shipping industry non-supervisory personnel. I am informed that this is the case in various seacoast locations including the Port of Hampton Roads and with various shipping companies including specifically the United States Lines where MEBA represents various licensed engineering officers who enjoy no supervisory status whatsoever.

5. As pointed out in the Memorandum submitted herewith, this Court has already had occasion to determine the status of these defendants under the National Labor Relations Act. We there submit extracts of Judge Bruchhausen's decision of February 26, 1957 in Civil No. 17269, granting an NLRB petition to temporarily enjoin these

same defendants from conducting secondary picketing and a boycott of a Brooklyn shipyard. Thus, we find that this Court—after a full hearing at which these defendants, represented by the same counsel who appear in this case, had an opportunity to present all available evidence on the question--has found these unions to be subject to injunction under the Act. No appeal was taken from that decision.

I have in my possession a copy of the transcript of the testimony taken before Judge Bruchhausen on that occasion and shall, of course, submit this transcript to this Court if desired. Most pertinent, perhaps, of the evidence adduced at that hearing was the fact that each of these defendants has in the past filed with the NLRB the non-Communist affidavits required of officers of a "labor organization" under Section 9(h) [29 U. S. C. Section 159(h)] as a prerequisite to the invoking of any of the rights of a labor organization as such provided in the National Labor Relations Act, as amended. MMP President Atkins and MEBA President Daggett have filed such qualifying affidavits.

6. (a) As of December 30, 1956, MMP had invoked the jurisdiction of the National Labor Relations Board as a petitioning labor organization on no less than thirteen occasions and on at least five of these occasions was accepted and dealt with by the Board as a labor organization. I have reference to the following:

Sinclair Refining Co., Case No. 2-RC-4734
Sinclair Refining Co., Case No. 14-RC-1912
Marine Transit Co., Case No. 13-RC-3733
Economy Boat Stores, Case No. 14-RC-2549
Blue Stack Towing Co., Case No. 10-RC-2947.

In addition to the foregoing, MMP was permitted to intervene in *Commercial Barge Lines, Inc.*, Case No. 35-RC-314.

(b) As of December 20, 1956, MEBA had invoked the jurisdiction of the National Labor Relations Board as a petitioning labor organization on no less than seven occasions and on at least six of these occasions was accepted and dealt with by the Board as a labor organization. I have reference to the following:

American Barge Line Co., Case No. 6-RC-419
Ohio Barge Line, Inc., Case No. 6-RC-615
O. F. Shearer & Sons, Case No. 9-RC-1100
Blue Stack Towing Co., Case No. 10-RC-2958
North Star Fisheries, Case No. 19-RC-1746
Aleutian Marine Transport Co., Case No. 19-RC-1761

In addition to the foregoing, MEBA also appeared as a recognized union in *San Francisco Towboat Operators*, Case No. 20-RC-3037.

7. The NLRB has specifically found both MMP and MEBA to be labor organizations in *J. W. Banta Towing Co., Inc.*, 116 NLRB 1787, decided prior to this Court's decision in Civil No. 17269. The Board's general counsel has also in recent months authorized the issuance of complaints alleging that MMP and various of its locals are labor organizations in cases stemming from various actions taken by MMP in connection with Bull's parent corporation, American Coal Shipping, Inc. In this regard I have reference to Case No. 2-CC-410; Case No. 5-CC-71; and Case No. 10-CC-289.

Moreover, the NLRB's Second, Fifth and Tenth Regional offices have all in the past Spring dismissed complaints filed by either or both of these associations upon the grounds that, while they are labor organizations within the meaning of the Act. they are no longer in compliance with Section 9(f), (g) and (h) of the Act. Thus, on May

23, 1957 Fifth Regional Director John A. Penello, in dismissing charges filed by MMP, commented as follows:

> "It does not appear that further proceedings are warranted inasmuch as the charge has been filed by and on behalf of a labor organization which has not complied with the provisions of Section 9(f), (g) and (h) of the Act, as amended. I am, therefore, refusing to issue Complaint in this matter."

8. Finally, in at least two recent instances following upon this Court's decision in Civil No. 17269 other Federal District Courts have found MMP to be a labor organization. I refer to *Penello* v. *Seafarers International Union, et al.,* Civil No. 2371, E. D. Va., and *Getreu* v. *MMP, et al.,* Civil No. 906, S. D. Ga., Savannah Div.

9. I submit that the foregoing fully warrants this Court in holding defendants MEBA and MMP to be "labor organizations representing employees in an industry affecting commerce" as defined in the National Labor Relations Act as amended.

JAMES V. HAYES.

(Sworn to on October 9, 1957.)

Supplemental Affidavit of Lee Pressman

(Record, pp. 27-38)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LEE PRESSMAN, being duly sworn, deposes and says:

1. I am the attorney for the defendant National Marine Engineers' Beneficial Association, AFL-CIO, herein.

I make this supplemental affidavit in reply to the affidavit submitted by James V. Hayes in this proceeding.

2. In Paragraph 4 of the aforesaid supplemental affidavit, Mr. Hayes states:

> "I am informed, defendant Marine Engineers Beneficial Association ('MEBA' herein) also represents in various bargaining units throughout the shipping industry non-supervisory personnel."

And further in this paragraph, Mr. Hayes makes another statement which is predicated on what he has been "informed."

Certainly the statements contained in said Paragraph 4 of the supplemental affidavit cannot be accepted as statements of fact in support of an allegation contained in a complaint, which allegation is vital to sustain the jurisdiction of the court. A statement as to what counsel is "informed" can not be accepted as a substitute for specific facts.

Supplemental Affidavit of Lee Pressman

This should be compared with the specific and direct averments made by H. L. Daggett, President of the MEBA, in his affidavit which describe the duties and responsibilities of all the members of MEBA which clearly make them supervisors as defined by the Taft-Hartley Act. President Daggett specifically negates the suggestion that MEBA represents non-supervisory personnel.

I can state as of my own personal knowledge that the MEBA does not represent any personnel in the United States Lines who enjoy no supervisory status. To the contrary, MEBA represents, as far as the United States Lines (which is the only specific company named in the specific affidavit) is concerned, only licensed engineer officers, who enjoy supervisory status.

3. In Paragraph 5 of the supplemental affidavit, Mr. Hayes refers to the decision of Judge Bruchhausen on February 26, 1957, in Civil number 17269.

In our oral argument we pointed out that this proceeding was on a petition to temporarily enjoin the MEBA, among others, from conducting an alleged secondary boycott.

It was in this proceeding that President Daggett also testified with respect to the filing of the non-Communist affidavits with the National Labor Relations Board. His testimony was to the effect that such affidavits were filed not because of any feeling or understanding on the part of the MEBA that it was a labor organization, but rather pursuant to a policy determined by the MEBA to file such affidavits to demonstrate that the officers of the MEBA were not Communists. Judge Bruchhausen undoubtedly must recall that in the course of this same proceeding, counsel for the National Labor Relations Board conceded that the Labor Board accepted such affidavits for filing, regardless which organization might present the same, and made no inquiry as to whether the organization submitting the affi-

davits was a labor organization or not, and that the filing of the same did not indicate whether the organization was a labor organization or not.

Finally, the aforesaid proceeding was one brought under Section 10(1) of the Taft-Hartley Act, which specifically provides that a temporary injunction must issue where the court finds "reasonable cause to believe" that a secondary boycott has been committed. This is the only standard of proof required. In a similar proceeding before Judge Hoffman in the United States District Court in Norfolk, the opinion of Judge Hoffman indicates that while the Board may have sustained its burden of proof of "reasonable cause to believe," the preponderance of evidence in that case showed that MEBA was not a labor organization within the meaning of the term as defined in the Taft-Hartley Act. (Copy of opinion was left with Judge Bruchhausen).

4. In Paragraph 6(b) of the supplemental affidavit, Mr. Hayes, enumerates seven cases with respect to which he states that the MEBA has invoked the jurisdiction of the National Labor Relations Board as a petitioning labor organization, and that in at least six of these cases, MEBA was accepted by the Board as a labor organization. The facts are as follows:

In one of these cases, namely, Aleutian Marine Transport Co. Case No. 19-RC-1761, the MEBA was not even involved. In that case it was the Brotherhood of Marine Engineers, AFL-CIO, which was in the proceeding and was certified by the National Labor Relations Board as the collective bargaining representative for the employees therein covered. The Brotherhood of Marine Engineers is a completely different organization and has nothing whatever to do with the MEBA.

In four other cases, namely, Ohio Barge Line, Inc., O. F. Shearer & Sons, Blue Stack Towing Co. and North Star

Fisheries, the Regional Directors of the Labor Board refused to hold elections in such cases on the ground that the employees involved were "supervisors."

In the American Barge Line Company case, the Regional Director held a consent election at the joint request of the employer and the MEBA, which under the then outstanding rules of the Labor Board, the Regional Director was permitted to do even though the employees involved were "supervisors."

In the last case, namely San Francisco Towboat Operators, it was the employer which petitioned for an election and the petition was withdrawn by the employer on the ground that the employees involved were "supervisors."

In all of the aforesaid cases (other than the Aleutian Marine Transport Co. case, of which I have no knowledge because the MEBA was not involved) the personnel involved were marine engineers—and as indicated all were found to be "supervisors."

5. In Paragraph 7 of the supplemental affidavit, Mr. Hayes makes reference to the J. W. Banta Towing Company case.

With respect to this case, I am attaching as Exhibit A a certified copy of a motion made in behalf of MEBA before the National Labor Relations Board, requesting that the record in the Banta case be opened and leave be given to amend the answer on behalf of MEBA, and to receive evidence on the issue as to whether MEBA is a labor organization, together with a copy of an affidavit submitted by H. L. Daggett in support of this motion, and the order of the Labor Board denying the motion.

In that case, the Labor Board, it is true, found that the MEBA was a labor organization, but specifically upon the ground that the answer submitted by MEBA admitted such fact. There was no evidence presented in the case on this issue.

Supplemental Affidavit of Lee Pressman

The affidavit of President Daggett explains very directly that the answer filed in said case, which admitted that MEBA was a labor organization, was filed without the knowledge of any official of the MEBA and without the authorization of the MEBA, and that the admission on this issue was not true in fact and completely contrary to the actual fact.

6. The second paragraph of Paragraph 7 of the supplemental affidavit would seem to be inapplicable to the MEBA, since there is no reference contained therein to the MEBA.

7. Therefore, on the issue as to whether the MEBA is a labor organization within the meaning of the Taft-Hartley Act—which is one of the essential ingredients to establish the jurisdiction of this court to entertain the suit brought by the plaintiff—we have the direct statements of H. L. Daggett which negate this fact and establish that the MEBA is not a "labor organization." On the other hand, though the plaintiff has the burden to establish such essential fact, we have offered but slight inferences or inaccurate statements.

We also find that the verified complaint filed by the plaintiff in the state court proceeding (which is attached to my previous affidavit) has a specific allegation (Paragraph 12 thereof) that

> "The members of the defendant unions (which includes the MEBA) are not employees within the meaning of the Labor Management Relations Act of 1947, as amended."

If all the members of the MEBA are not employees as defined by the Taft-Hartley Act, then clearly under the DiGiorgi case, cited in our brief, the MEBA cannot be held to be a labor organization.

In any event, plaintiff has not furnished a single fact to challenge the contention of MEBA that the marine engineers covered by the very collective bargaining agreement for breach of which the suit has been initiated, are "supervisors" as defined by the Taft-Hartley Act and therefore not "employees." To the contrary, the aforesaid verified complaint filed by the plaintiff in the state court proceeding specifically avers in two separate paragraphs that the personnel of the plaintiff covered by the collective bargaining agreement with MEBA are "supervisors" and that all members of MEBA are "supervisors."

8. I respectfully submit that the foregoing compels this court to hold that the plaintiff has completely failed to make any showing with respect to the necessary statutory requirements which must be present before this court can assume jurisdiction of the suit under Section 301 of the Taft-Hartley Act.

The plaintiff has failed to show that:

(a) The suit is for a violation of a contract between an employer and a "labor organization"; and

(b) The contract covers "employees' in an industry affecting commerce.

These are the jurisdictional requirements of Section 301(a) of the Taft-Hartley Act.

It certainly cannot be contended that such requirements are met by merely showing that the contract, for breach of which suit has been brought, is between an employer and a labor organization even though the employer is not in an industry affecting commerce or that the contract does not cover "employees' but the labor organization chances to represent employees in some other industry affecting commerce. Such contention would mean that where an em-

ployer is not engaged in an industry affecting commerce so that the contract in question does not cover "employees" in an industry affecting commerce, but the contract is with a labor organization which by chance happens to otherwise represent "employees" in another industry affecting commerce, a suit may be brought by such employer in the Federal Court for the breach of its contract. The mere statement of the position reveals how preposterous it is.

LEE PRESSMAN

(Sworn to to this 11th day of October, 1957.)

Exhibit A, Annexed to Affidavit of Lee Pressman

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

I, FRANK M. KLEILER, Executive Secretary of the National Labor Relations Board, being duly authorized by the Rules and Regulations of said Board, do hereby certify that annexed hereto is a full, true, and complete copy of the Order Denying Motions, Notice of Motion, and Affidavit of Herbert L. Daggett In the Matter of National Organization Masters, Mates and Pilots of America, Inc. AFL-CIO; and National Marine Engineers Beneficial Association, AFL-CIO; and National Maritime Union of America, AFL-CIO; and Rivers Joint Organizing Committee; and their Agent Gordon C. Knapp and J. W. Banta Towing Company, Inc. and Plaquemine Towing Corporation, Case No. 14-CB-291.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the National Labor Relations Board this day of September 20, A. D. 1957 at Washington, D. C.

FRANK M. KLEILER,
Executive Secretary.

(SEAL)

Exhibit A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 14-CB-291

NATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, INC, AFL-CIO; and NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO; and NATIONAL MARITIME UNION OF AMERICA, AFL-CIO; and RIVERS JOINT ORGANIZING COMMITTEE; and their Agent GORDON C. KNAPP

and

J. W. BANTA TOWING COMPANY, INC. and PLAQUEMINE TOWING CORPORATION

ORDER DENYING MOTIONS

On December 18, 1956, the Board issued a Decision and Order [1] in the above-entitled proceeding. Thereafter, about May 29, 1957, Respondent National Organization Masters, Mates and Pilots of America, Inc. AFL-CIO filed a motion for leave to amend its answer and to reopen the record and receive evidence upon the proposed amendment. About June 7, 1957, Respondent National Marine Engineers

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[1] 116 NLRB 1787.

Exhibit A

Beneficial Association, A. L-CIO, filed a motion seeking the same relief in its own behalf. The Charging Companies in this case, about June 10, 1957, filed opposition. The Board having duly considered the matter, and having found no sufficient reason for granting the relief requested,

IT IS HEREBY ORDERED that the motions of the respective Respondents be, and they hereby are, denied.

Dated, Washington, D. C., July 24, 1957.

By direction of the Board

OGDEN W. FIELDS,
Acting Executive Secretary.

Exhibit A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOURTEENTH REGION

Case No. 14-CB-291

In the Matter of

NATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, INC., AFL; and NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION, CIO; and NATIONAL MARITIME UNION OF AMERICA, CIO; and RIVERS JOINT ORGANIZING COMMITTEE; and their Agent GORDON C. KNAPP

and

J. W. BANTA TOWING COMPANY, INC. and PLAQUEMINE TOWING CORPORATION

NOTICE OF MOTION

Sirs:

PLEASE TAKE NOTICE THAT upon the affidavit of Herbert L. Daggett, sworn to on the 23rd day of May, 1957, and upon all the pleadings heretofore filed herein, respondent National Marine Engineers Beneficial Association, AFL-CIO, charged herein as the National Marine Engineers Beneficial Association, CIO, moves the Board for leave to amend its answer, and to reopen the record and receive evidence upon the issues raised by the amended answer,

and for such other and further relief as may seem proper to the National Labor Relations Board

Yours, etc.,

LEE PRESSMAN
Office & P. O. Address
225 Broadway
New York 7, N. Y.
Attorney for Respondent,
National Marine Engineers
Beneficial Association, AFL-CIO

To:

HENRY L. JALETTE, Esq.
for the General Counsel
National Labor Relations Board
Washington 25, D. C.

W. MUNRO ROBERTS, JR., Esq.
1118 Arcade Building
St. Louis, Missouri
For the Charging Party

WILLIAM J. COSTELLO, Esq.
418 Olive Street
St. Louis, Missouri
For the Respondents

Exhibit A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOURTEENTH REGION

Case No. 14-CB-291

In the Matter of

NATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, INC., AFL; and NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION, CIO; and NATIONAL MARITIME UNION OF AMERICA, CIO; and RIVERS JOINT ORGANIZING COMMITTEE; and their Agent GORDON C. KNAPP

and

J. W. BANTA TOWING COMPANY, INC. and PLAQUEMINE TOWING CORPORATION

AFFIDAVIT OF HERBERT L. DAGGETT

STATE OF LOUISIANA
PARISH OF ORLEANS
CITY OF NEW ORLEANS } ss.:

HERBERT L. DAGGETT, being duly sworn, deposes and says:

I am the National President of the National Marine Engineers Beneficial Association, AFL-CIO, charged herein as the National Marine Engineers Beneficial Association, CIO, hereinafter called the MEBA.

Exhibit A

This affidavit is being submitted in support of the motion to amend paragraph 5 of the respondent's answer and to reopen the record and receive evidence upon the issues raised by the amended answer.

In this proceeding, charges were filed December 28, 1954. A complaint was issued July 6, 1955, naming the MEBA as one of the respondents. It alleged in paragraph IV that the MEBA was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended (herein called the Act).

One attorney represented all the respondents and filed a single joint answer for all the respondents.

One of the allegations of the complaint which was admitted by the answer was that the respondent MEBA was a labor organization within the meaning of Section 2(5) of the Act. The attorney for the respondents was not authorized by MEBA to make such an admission with respect to it. MEBA does not admit that it is a labor organization within the meaning of the Act, and it is not in fact a labor organization within the meaning of the Act.

In recent proceedings initiated by the General Counsel of the National Labor Relations Board against MEBA, arising out of MEBA's picketing of ships of American Coal Shipping, Inc., the issue has arisen as to whether MEBA is in fact a labor organization within the meaning of Section 2(5) of the Act. In all of these proceedings the MEBA has denied that it is such a labor organization. However, in each instance, the General Counsel of the National Labor Relations Board has introduced in each such proceeding the pleadings in this case as evidence to establish that the MEBA is such a labor organization. In spite of the fact that in each such proceeding the MEBA has denied that it is such a labor organization, nevertheless the Courts have held that the aforesaid evidence constitutes

Exhibit A

reasonable grounds to believe that MEBA is a labor organization within the meaning of Section 2(5) of the Act. In one such case, the Court commented on the fact that the admission in this instant proceeding has been permitted to stand without any attempted correction.

The significance which has thus been drawn by this unauthorized admission in these current proceedings makes it necessary for the MEBA to make this motion.

WHEREFORE, it is respectfully submitted that this motion be granted, and the respondent MEBA be permitted to file an amended answer changing paragraph 5 to the following:

> "Respondent denies the allegations contained and set forth in paragraph IV."

And respondent prays for such other and further relief as to the Board may seem proper.

HERBERT L. DAGGETT.

(Sworn to May 23, 1957.)

Supplemental Affidavit of Charles T. Atkins

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(Record, pp. 39-40)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES T. ATKINS, being duly sworn, deposes and says:

I am International President of the International Organization of Masters, Mates & Pilots and submit this supplemental affidavit in opposition to plaintiff's motion for a temporary injunction and in support of defendant's cross-motion to dismiss the complaint.

Supplemental Affidavit of Charles T. Atkins

Deponent has been a member of the Organization for many years and has sailed as a licensed deck officer in all positions, including master. I am fully familiar with the work done by deck officers and members of the Organization.

All members of the Organization perform work in which they have authority in the interests of their employers, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action. The exercise of such authority is not merely of a routine or clerical nature, and requires the use of independent judgment. Members who are unlicensed perform the same type of work as those who are licensed and have the same authority.

I have examined the records maintained by Local No. 2 of the International Organization of Masters, Mates & Pilots and I can state that many of the members reside and are domiciled in the State of Delaware.

WHEREFORE, it is prayed that the motion for a temporary injunction be denied and the cross-motion to dismiss the complaint be granted.

CHARLES T. ATKINS.

(Sworn to on October 11, 1957.)

Affidavit of George C. Kinney

(Record, pp. 41-42)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GEORGE C. KINNEY, being duly sworn, deposes and says:

I am employed with the firm of Donovan Leisure Newton & Irvine, attorneys for the plaintiff herein.

On Thursday, October 10, 1957 at 9:30 o'clock in the forenoon I telephoned the Chief Clerk of the Department of State, Division of Corporations, 164 State Street, Albany, New York, inquired as to the nature of any papers on file in that office for International Organization of Masters, Mates and Pilots, Inc., and was told that the following information is on file:

> International Organization of Masters, Mates and Pilots, Inc. is a domestic corporation which lists New York County as its address (no street address given).
>
> It assumed its present name on August 13, 1954, when a Certificate of Change of Name was filed by Weil, Glenn & Thatcher, Attorneys for the Union, 736 Bowen Building, Washington, D. C.

The original Certificate of Incorporation was filed on April 3, 1891 for Grand Harbor of the American Brother-

hood of Steam-Boat Pilots of the United States. On November 26, 1894 a Certificate was filed changing the name to American Association of Masters and Pilots of Steam Vessels. On July 8, 1905 a Certificate was filed changing the name to American Association of Masters, Mates and Pilots. On February 20, 1920 a Certificate was filed changing the name to National Organization, Masters, Mates and Pilots of America, Inc. On August 13, 1954 a Certificate was filed changing the name to International Organization of Masters, Mates and Pilots, Inc., which is the present name of the corporation.

GEORGE C. KINNEY.

(Sworn to on October 11, 1957.)

Opinion of Bruchhausen, *J.*

(Record, pp. 114-124)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil No. 18060

October 17, 1957

[SAME TITLE]

Appearances:

SATTERLEE, BROWNE & CHERBONNIER
and
DONOVAN, LEISURE, NEWTON & IRVINE
Attorneys for Plaintiff
James V. Hayes
A. V. Cherbonnier
Theodore S. Hope
Sidney P. Howell, Jr.
Helmut J. F. Furth
Of Counsel

LEE PRESSMAN
Attorney for Defendant,
National Marine Engineers'
Beneficial Association, AFL-CIO

MARVIN SCHWARTZ
Attorney for Defendant,
International Organization of Masters, Mates and
Pilots, Inc., AFL-CIO

BETTY M. OLCHIN
Of Counsel

Opinion of Bruchhausen, J.

BRUCHHAUSEN, *D. J.*:

The plaintiff, an operator of ships engaged in cargo transportation, instituted this action against the defendants for specific performance of collective bargaining agreements, made between the plaintiff and each of the defendants. The subject motion is for provisional remedies, enforcing the agreements, pendente lite.

The defendant, National Marine Engineers' Beneficial Association, AFL-CIO is hereinafter called "MEBA."

The defendant, International Organization of Masters, Mates and Pilots, Inc., AFL-CIO is hereinafter called "MMP."

The plaintiff and the defendant, MEBA, as representative of the licensed engineering officers, employed aboard the plaintiff's vessels, entered into a collective bargaining agreement, bearing date June 18, 1955, which by its terms does not expire until June 15, 1958. The agreement provided that "there shall be no strikes, lockouts or stoppages of work during the period of this agreement," also grievance procedure, for the arbitration of all disputes, relating to its interpretation or performance. It also obligated the defendant MEBA to furnish plaintiff on call, and as the plaintiff might from time to time, require, competent and fit licensed officers to serve aboard plaintiff's vessels.

The plaintiff and the defendant, MMP, as the representative of Licensed Deck Officers, other than the Masters of vessels, entered into a similar agreement, bearing date July 1, 1955, expiring on September 30, 1958, which agreement contained an additional provision, viz.:

> "It is understood that in the event a picket line is established against any vessel, the Licensed Deck Officers of such vessel will report and perform all of their normal duties incidental to the security of the vessel, passengers and cargo, provided that no Li-

censed Deck Officer shall be required to work under conditions which may endanger his health or safety. The Organization undertakes to use its best efforts to obtain clearance for such purpose from the Union establishing the picket line."

On or about August 19, 1957 each defendant called a strike against the plaintiff. The strikes have been on ever since.

Prior to the aforesaid work stoppages, negotiations were had, pursuant to wage reopening clauses contained in the agreements. The parties came to no agreement thereon. The plaintiff contends that no dispute then existed between the parties, excepting that the defendants claimed that their members, employed by the plaintiff, had a feeling of insecurity because of fears that the plaintiff's parent corporation, American Coal Shipping, Inc., whose officers were not and are not represented by the defendants, might take over plaintiff's operations, also that the defendants declined to arbitrate the matter. Significantly, MEBA admits that, besides demanding a 6% wage increase, it requested an additional amount for its engineer members "sufficient to compensate them for a possible complete loss of their jobs through the transfer of their vessels to American Coal" (Exhibit E, attached to affidavit of Herbert L. Daggett, sworn to October 9, 1957). MMP makes a similar admission (affidavit of Charles T. Atkins, October 8, 1957, at page 4). It appears that the plaintiff acquiesced in the 6% wage increase, which had previously been generally adopted in the dry cargo shipping industry.

In neither agreement is the no-strike clause qualified by the wage reopening clause. The defendants, by the terms of the agreements, were not entitled to strike by reason of the collapse of the wage negotiations, whatever the cause.

The work stoppages have caused and are causing serious loss, damage and irreparable injury to the plaintiff for which it has no legal remedy.

As to the Defendants' Claim That the Court Has No Jurisdiction of the Action

The plaintiff, in its complaint, alleged as the basis for jurisdiction the diversity of citizenship of the parties and Section 301 of the National Labor Management Act, 1947 (29 U. S. C. A. 185).

There is complete diversity between the plaintiff, a Delaware corporation, and the defendant, MMP, a New York corporation. This cause of action is separate and apart from the plaintiff's case against the defendant MEBA.

There is some doubt as to whether diversity exists in the action between the plaintiff and MEBA, in that there is evidence that some of the members of MEBA reside in the State of Delaware, the same State wherein the plaintiff was and is incorporated.

This leads to a consideration of the second alleged ground of jurisdiction, the aforesaid Section 301 of the National Labor Management Act, 1947, which vests District Courts with jurisdiction of "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act * * * without respect to the amount in controversy or without regard to the citizenship of the parties."

The defendant, MEBA, contends that it is not "a labor organization" and the individuals it represents are not "employees," as those terms are defined in the Act, but that they are "supervisors." Section 2(3) of the Act provides that supervisors shall not be deemed employees. Supervisory personnel are in the category of management and, therefore, were and are not within the scope and purpose of the statute.

The plaintiff claims that in various prior proceedings the defendant MEBA made admissions that it was "a labor organization," while, on the other hand, the said defendant

challenges those statements or their effect and alleges that the individuals are "supervisors," within the meaning of the Act. As to the present application, it is not necessary to adjudicate these issues, other than to find, as this Court does find that the plaintiff presents a substantial Federal question and that this Court can decide the matter only after it has assumed jurisdiction over the controversy. The complaint herein alleges the violation of a single right, the right to have its agreement performed and a single claim for relief. Under these circumstances, the Court assumes jurisdiction of the action. *Strachman* v. *Palmer*, 177 F. 2d 427; *Hurn* v. *Oursler*, 289 U. S. 238 and *Brown* v. *Haldale Estates, Inc.*, 151 F. Supp. 118.

The defendants further contend, that even if this Court should have jurisdiction of the action by reason of diversity or otherwise, such jurisdiction is controlled or limited by the Norris-LaGuardia Act of 1932 (29 U. S. C. 101 et sequa), particularly Section 104 thereof, which provides, in substance, that a Federal Court may not issue an injunction in a "labor dispute."

At the time of enactment of that law, the country was in the grip of a severe economic depression and collective bargaining was practically non-existent. The legislative policy, proclaimed in Section 102, emphasizing that workers should be unhampered in their efforts to organize, stated that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." To the same effect is the statement in the recent case of *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, viz.:

> "The Norris-LaGuardia Act * * * was designed primarily to protect working men in the exercise of organized, economic power which is vital to collective bargaining."

Clearly, the purpose of the statute was to force employers to bargain collectively with their employees.

Likewise, it is plain that the Congress intended that "Supervisors" should not be governed by that Act, or by any other national or local law in that in Section 14(a) (29 U. S. C. 164(a)) of the National Labor Management Act, 1947, it is stated that "no employer * * * shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

The intent of Congress that supervisory personnel should be regarded as part of the management for the purpose of collective bargaining is disclosed in the report of the House Committee on Education and Labor, H. R. Report No. 345, 80th Congress, First Session, 1947. See also *National Labor Relations Board* v. *Edward G. Budd Manufacturing Co.*, 169 F. 2d 571, 578 and *L. A. Young Spring & Wire Corp.* v. *National Labor Relations Board*, 163 F. 2d 905, 906.

A dispute between an employer and a supervisory union over the terms of employment of its members, therefore, is no more a "labor dispute" than a disagreement between officers of a corporate entity or any other group of employers. See *260 Madison Avenue Corp.* v. *Nelson*, 284 App. Div. 254.

It follows that the Norris-LaGuardia Act does not affect or bar the plaintiff herein.

In the absence of statutory restriction, such as set forth in that Act, a Federal Court has the power to enjoin. *Gomez* v. *United Office and Professional Workers*, 73 F. Supp. 679, 683.

Furthermore, where New York law is applicable, it should be followed by a Federal Court. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. The New York Courts have granted injunctions in cases of violations of no-strike clauses. *Stewart Stamping Corp.* v. *Uprichard*, 133 N. Y. S.

2d 579, order affirmed 284 App. Div. 902; *Bee Line* v. *Long Island Local 252, Etc.*, 157 N. Y. S. 2d 232 and *Schlessinger* v. *Quinto*, 117 Misc. 735, affirmed in 201 App. Div. 487.

In the said *Schlessinger* case in the lower court, Mr. Justice Wagner, later a member of the United States Senate, said:

> "It is elementary, and yet sometimes requires emphasis, that the door of a court of equity is open to employer and employee alike. It is no respecter of persons—it is keen to protect the legal rights of all."

The Appellate Court in sustaining the injunction decree granted by Mr. Justice Wagner, pointed out that the officials of a labor union are obligated to exercise their powers of requiring performance of the contract by the Union members. The Court, on this point, said:

> "Two organizations, one composed of employers and the other of employees, have entered into an agreement. Each had power through the consent of its members to enter into a binding obligation in their behalf. By the constitution or by-laws of each, power is given to the organization to enforce, through disciplinary proceedings which have been demonstrated to be effective, compliance with the terms and conditions to which it has subscribed. This contract has mutual obligations binding on the parties thereto. Each party knows the obligation that it has assumed and the consequences of failure or refusal to perform those requirements. Through its control of its members it can compel performance. Under such circumstances, a decree of a court of equity can be enforced against either party and in favor of the other. Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 248, 160 N. Y. Supp. 279. An organization,

having such power to require performance by individual members, can through its officers be compelled to exercise that power. There is in this contract a mutuality of obligation, and there is also a mutuality of remedy for its enforcement."

While in the recent case of *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (decided June 3, 1957), the plaintiff therein, a labor union, invoked the Court to act, pursuant to Section 301 of the 1947 Act, and to order the defendant, the employer, to submit to arbitration, as provided by the terms of the collective bargaining agreement, entered into between the parties, it has an important bearing upon the instant controversy. It also contained a no-strike clause, similar to the one in the case at bar. The Court, in its opinion, in the said case quoted from the Senate and House Reports, which preceded the enactment of the statute. It appears in both reports that the primary concern was that unions and employers should both be bound to collective bargaining contracts and be governed by "the usual processes of the law."

The intent and purpose of the legislation, reported by the Senate, quoted in the said opinion, in substance, is as follows:

1. That the chief advantage which an employer can reasonably expect from a collective labor agreement is the assurance of uninterrupted operation during the term of the agreement.

2. That without some effective method of assuring freedom from economic warfare for the term of the agreement there is little reason why an employer would desire to sign such a contract.

3. That to encourage the making of agreements and to promote industrial peace through faithful performance

by the parties, collective agreements affecting interstate commerce should be enforceable in the federal courts.

It will be noted that the Senate Committee, so reporting, did not limit faithful performance to any particular breach or to any particular party, committing the breach. It clearly meant to insure faithful performance of the entire agreement to the end that there should be industrial peace. There could be no such assurance if either party, at will, might breach the contract by refusal to perform, and there be no adequate enforcement procedure.

The facts and the law warrant the remedy of specific performance, which embraces affirmative as well as negative acts. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 126 F. 2d 978.

The plaintiff's motion is granted. The defendants' cross motions are denied. Settle order on two days' notice at which time the parties may submit their proposals as to security and preference of the trial.

WALTER BRUCHHAUSEN
U. S. D. J.

Order Granting Preliminary Injunction

(Record, pp. 125-128)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil No. 18060

[SAME TITLE]

Plaintiff having moved herein for an order pendente lite enjoining defendants, National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, and said defendants having cross moved herein and these causes having come before the Court on October 9, 1957, and the Court having heard argument by James V. Hayes, Esq., counsel for plaintiff, and Lee Pressman, Esq. and Marvin Schwartz, Esq., counsel for the respective defendants, and having received and considered the affidavits and briefs filed on behalf of the respective parties, and, after due deliberation, it appearing that the Court has jurisdiction of this action, that there are presently in existence and full effect collective bargaining agreements between plaintiff and each of the defendants, which agreements, by their terms, have not expired, and that defendants have violated and are presently violating the "no-strike" clauses and other provisions of said collective bargaining agreements, and it further appearing that, if defendants not be restrained preliminarily, plaintiff will suffer irreparable injury for which it has no adequate legal remedy, and the Court having, on October 17, 1957, filed its opinion herein, and plaintiff having filed, and the Court having approved, the undertaking as prescribed by Rule 65(c) of the Federal Rules of Civil Procedure, it is therefore,

ORDERED that, effective October 21, 1957 at 5:00 P. M. Eastern Daylight Saving Time, defendants National Marine

Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, their officers, agents, members, servants, employees, attorneys, and all persons in active concert or participation with them who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking or inciting, causing, inducing, or, in any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. H. Bull Steamship Co., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is

FURTHER ORDERED that each of said defendants specifically perform its respective agreement to furnish the plaintiff with capable, competent and physically fit licensed engineering or deck officers when and where they are required and of the ratings needed to fill vacancies necessitating the employment of such Licensed Personnel in ample time to prevent any delay in the scheduled departure of any vessel covered by said agreements; and it is

FURTHER ORDERED that each of said defendants shall, so long as this Order remains in effect, promptly clear, validate or otherwise certify for employment aboard plaintiff's said vessels such qualified licensed officers who are members of the defendants' Unions as plaintiff may, from time to time, require; and it is

FURTHER ORDERED that defendants' cross motions be and the same are hereby, in all respects, denied; and it is

FURTHER ORDERED that the Court's opinion filed herein on October 17, 1957, shall constitute the findings of fact and conclusions of law as required by Rule 52(a) of the Rules of Civil Procedure.

Dated: Brooklyn, New York, October 21, 1957.

s/ WALTER BRUCHHAUSEN
United States District Judge

Counter-Order Submitted by National Marine Engineers' Beneficial Association, AFL-CIO

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff having moved herein for a preliminary injunction, and defendant, National Marine Engineers' Beneficial Association, AFL-CIO having cross-moved herein, and the Court having considered the complaint herein, and the affidavits submitted in support of the motion for preliminary injunction, and the several affidavits together with the exhibits annexed thereto submitted in opposition to said motion, and in support of the said cross-motion, and after hearing argument by James V. Hayes, Esq., counsel for plaintiff, and Lee Pressman, Esq. and Marvin Schwartz, Esq., counsel for the respective defendants, and the Court having received and considered the briefs of counsel, and after due deliberation, the court having filed its opinion herein on October 17, 1957, and the plaintiff having filed and the Court having approved the undertaking prescribed by Rule 65(c) of the Federal Rules of Civil Procedure, it is therefore

ORDERED, that effective October 22 at o'clock Eastern Daylight Saving Time, defendant, National Marine Engineers' Beneficial Association, AFL-CIO, its officers, agents, servants, employees, attorneys and those persons in active concert or participating with them who received actual

Counter-Order Submitted by National Marine Engineers' Beneficial Association, AFL-CIO

notice of this order, be and the same hereby are restrained, during the pendency of this action, from picketing, striking or otherwise causing any work stoppage aboard any of the vessels owned or operated by plaintiff wherever such vessels may be, and it is

FURTHER ORDERED, that the defendant's cross-motion be and the same hereby is in all respects denied.

Dated, Brooklyn, New York,
October , 1957.

Enter,

U. S. D. J.

Counter-Order Submitted by International Organization of Masters, Mates and Pilots, Inc. AFL-CIO

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff having moved herein for an order pendente lite enjoining defendants, National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, and said defendants having cross moved herein and these causes having come before the Court on October 9, 1957, and the Court having heard argument by James V. Hayes, Esq., counsel for plaintiff, and Lee Pressman, Esq. and Marvin Schwartz, Esq., counsel for the respective defendants, and having received and considered the affidavits and briefs filed on behalf of the respective parties, and, after due deliberation, it appearing that the Court has jurisdiction of this action, that there are presently in existence and full effect collective bargaining agreements between plaintiff and each of the defendants, which agreements, by their terms, have not expired, and that defendants have violated and are presently violating the "no-strike" clauses of said collective bargaining agreements, and it further appearing that, if defendants not be restrained preliminarily, plaintiff will suffer irreparable injury for which it has no adequate legal remedy, and the Court having, on October 17, 1957, filed its

Counter-Order Submitted by International Organization of Masters, Mates and Pilots, Inc. AFL-CIO

opinion herein, and upon the filing by plaintiff and the approval by the Court of the undertaking as prescribed by Rule 65(c) of the Federal Rules of Civil Procedure, it is, therefore,

ORDERED that defendants National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, their officers, agents, members, servants, employees, attorneys and all persons in active concert or participation with them who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking or inciting, causing, inducing, or, in any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. H. Bull Steamship Co., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is

FURTHER ORDERED that enforcement of this Order be stayed pending appeal by the defendants; and it is

FURTHER ORDERED that defendants' cross motions be and the same are hereby, in all respects, denied; and it is

FURTHER ORDERED that the Court's opinion filed herein on October 17, 1957, shall constitute the findings of fact and conclusions of law as required by Rule 52(a) of the Rules of Civil Procedure.

Dated: Brooklyn, New York, October , 1957.

Enter

Notice of Appeal

(Record, p. 131)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that the defendants, National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, hereby appeal from the order herein dated October 21, 1957, granting a temporary injunction, and from each and every part thereof, and from the opinion of the court herein dated October 17, 1957, upon which the aforesaid order was based, and each and every part thereof.

Dated, New York, New York,
October 21, 1957.

Notice of Appeal

Yours, etc.,

LEE PRESSMAN,
Attorney for Defendant N. M. E. B. A.,
Office & P. O. Address,
225 Broadway,
New York City.

MARVIN SCHWARTZ,
Attorney for Defendant International Organization of Masters, Mates and Pilots, Inc., AFL-CIO,
Office & P. O. Address,
233 Broadway,
New York, N. Y.

To:

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs.,
Attorneys for Plaintiff,
2 Wall Street,
New York City.

SATTERLEE, BROWNE & CHERBONNIER, Esqs.,
Attorneys for Plaintiff,
30 Broad Street,
New York City.

No. 365

FILED
DEC 24 1957
JOHN T. FEY, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 27,572

A. H. BULL STEAMSHIP CO.,
Plaintiff-Appellee,

against

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,
Defendant-Appellant

JOINT APPENDIX

SATTERLEE, BROWNE & CHERBONNIER,
DONOVAN LEISURE NEWTON & IRVINE,
Attorneys for Plaintiff-Appellee,
2 Wall Street,
New York 5, New York.

SEYMOUR W. MILLER,
Attorney for Defendant-Appellant,
26 Court Street,
Brooklyn 1, New York.

UNITED STATES COURT OF APPEALS
FILED
DEC 24 1957

JOINT APPENDIX

INDEX TO RECORD ON APPEAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

A. H. BULL STEAMSHIP CO.,
Plaintiff-Appellee,
against
SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,
Defendant-Appellant.

24 840
CIVIL No. ~~18007~~

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Docket Entries

9/16/57	Complaint filed—Summons Issued.
9/17/57	Summons Ret'd & filed—deft. served.
9/17/57	By Bruchhausen, J. Order to Show Cause with Proof of Service.
	Filed for Injunction etc. 9/18/57.
9/18/57	Before Bruchhausen, J. Hearing on Order to show cause for injunction etc. Decision Reserved. All papers by 9/19/57 at 2 P. M.
9/18/57	Affidavit of S. W. Miller Filed.
9/18/57	Affidavit of Paul Hall Filed.
9/18/57	Notice of Cross Motion to dismiss complaint.
9/27/57	By Bruchhausen, J. Decision on Motion. Plaintiff's Motion is Granted. Deft's Cross Motion Denied. Settle Order on two days' notice, etc. See opinion.
9/30/57	By Bruchhausen, J. Order Filed Granting Preliminary Injunction.
9/30/57	Bond on Injunction Filed.
9/30/57	By Bruchhausen, J. Order Filed Re: Preference.
9/30/57	Batch of letters Filed.
9/30/57	Unsigned Order (proposed) Filed.
9/30/57	Notice of Appeal filed.
9/30/57	$250.00 Paid into Registry of Court in Lieu of Bond.

[1] **Complaint**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

A. H. BULL STEAMSHIP CO.,
Plaintiff,
against
SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,
Defendant.

CIV. No. 1800.

Plaintiff, by its attorneys, alleges, upon information and belief, as follows:

1. Plaintiff, a corporation duly organized and existing by virtue of the laws of the State of Delaware with its principal offices at 115 Broad Street, New York City, New York, is, and for many years has been, engaged in interstate and foreign commerce, being a common carrier by sea operating American-flag, dry cargo and other vessels in foreign and coastwise trade.

2. Defendant is an unincorporated labor organization engaged in representing or acting for its members and doing business as such through its duly authorized officers and agents within the State, City and Eastern District of New York with its principal place of business at 675 Fourth Avenue, Brooklyn, New York.

3. Jurisdiction of this Court over this action derives from, and is based upon, the Labor Management Relations Act of 1947, Title III, § 301, 61 Stat. 156, (29 U. S. C. A. § 185).

[2] 4. On or about October 3, 1956 plaintiff and defendant Union executed a written Amendment to a collective bargaining agreement then existing between them covering the unlicensed merchant seamen employed upon the

American-flag, dry cargo vessels operated by plaintiff in its regular course of business, which Amendment, among other things, extended the existing collective bargaining agreement between the parties to September 30, 1958. Said agreement, as so amended, a copy of which is attached hereto and made a part hereof as Exhibit A, is presently and, at all times material hereto, has been in full force and effect between the parties.

5. Article II of said agreement provides, in part, as follows:

> "Section 4. Stoppage of Work. There shall be no strikes, lockouts or stoppages of work while the provisions of this agreement are in effect."

6. Commencing on or about August 19, 1956, defendant Union, acting through its officers, agents, employees and members, has caused various vessels owned and operated by plaintiff to be picketed at plaintiff's Brooklyn Terminal in the Port of New York and has thereby ordered, induced and caused a complete stoppage of all work being performed aboard said vessels by the crews thereof.

7. Said work stoppages have to date resulted in preventing cargoes from being loaded or unloaded and have to date compelled plaintiff to cancel the departure from New York of four vessels originally due to depart on August 22nd and thereafter.

[3] 8. On or about September 11, 1957, defendant, acting through its officers, agents, employees and members, has similarly caused various of plaintiff's vessels to be picketed at the Port of San Juan, Puerto Rico, resulting in a total stoppage of all work being performed aboard said vessels. In addition, other vessels owned or operated by plaintiff have not been able to load cargoes consigned to New York and San Juan by reason of defendant's strike at said ports.

9. Defendant's officers and members have repeatedly threatened to cause and, unless restrained, will cause addi-

tional work stoppages aboard plaintiff's vessels at other ports of call.

10. The aforesaid work stoppages are in violation of said written collective bargaining agreement, as amended, and, in particular, Article II, Section 4 thereof.

11. Plaintiff has at all times past performed and is continuing to perform all the terms and conditions of the collective bargaining agreement with each respective defendant Union.

12. The work stoppages caused by defendants aboard plaintiff's vessels have caused and are causing plaintiff serious loss, damage and irreparable injury for which plaintiff has no adequate legal remedy in that plaintiff is daily losing to its competitors much valuable freight and passenger business which it may never recapture and is suffering an irreparable loss of good will among shippers, governmental agencies, prospective passengers and other segments of the public. Moreover, if said work stoppages continue, defendants' ability to respond in damages for the monetary loss caused plaintiff will be exhausted.

[4] 13. Said work stoppages have to date (i.e., September 16, 1957) caused plaintiff monetary damages on account of the six vessels strike-bound at New York and San Juan alone aggregating not less than $160,000 over and above plaintiff's loss of profits and good will occasioned by the necessity of plaintiff's customers placing their shipments with plaintiff's competitors.

14. Such damages and loss of profits and good will are continuing and will continue each day unless defendants are compelled to abide by their respective collective bargaining agreements.

15. Because of the continuing nature of the damage plaintiff is sustaining each day it is denied the use of its vessels by defendants' unlawful work stoppages, plaintiff requests leave to amend and supplement this complaint as and when the total damage sustained can be ascertained and calculated with reasonable accuracy.

WHEREFORE, plaintiff demands judgment as follows:

(a) that the Court find and declare that defendants, by picketing, striking and refusing to work upon plaintiff's vessels, are in violation of their respective collective bargaining agreements with plaintiff as amended;

(b) that the Court order defendants to perform specifically, for the duration of their respective collective bargaining agreements, their obligation not to strike or cause work stoppages aboard plaintiff's vessels;

[5] (c) that the Court temporarily and permanently enjoin defendants, their officers, agents and employees and all persons acting in concert and combination with defendants, from picketing, striking or otherwise causing any work stoppage aboard any or all of plaintiff's vessels so long as said collective bargaining agreements shall remain in full force and effect;

(d) that the Court award plaintiff such damages as it has sustained to date and hereafter in consequence of defendants' violation of its contractual obligation together with the costs and disbursements of this action;

(e) that the Court grant plaintiff such other, further and different relief as to the Court may appear just in the premises.

Dated: September 23, 1957

SATTERLEE, BROWNE & CHERBONNIER

By s/ A. V. CHERBONNIER
A Member of the Firm

DONOVAN LEISURE NEWTON & IRVINE

By s/ JAMES V. HAYES
A Member of the Firm

Attorneys for Plaintiff
2 Wall Street
New York 5, N. Y.

EXHIBIT A

Freightship Agreement

Between

SEAFARERS INTERNATIONAL UNION

ATLANTIC & GULF DISTRICT

AFL-CIO

and

Its Contracted Companies, including

A. H. BUIL STEAMSHIP CO.,

Effective October 15, 1956

Contract Expires September 30, 1958

[Facsimile copies of this Exhibit will be handed up upon argument.]

Order to Show Cause

* * *

[19] Upon the complaint herein and the annexed affidavit of MILTON WILLIAMS, it is

ORDERED, that defendant Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, show cause before this Court at a Motion Term thereof to be held in the Federal Building, Room 735, Washington and Johnson Streets, Brooklyn, New York, on the 18th day of September, 1957, at 10:00 A. M. or as soon thereafter as counsel can be heard, why an order should not be entered herein enjoining said defendant, its officers, agents, employees, members and attorneys and all persons acting in concert with it from inciting, causing or engaging in any strike or work stoppage affecting plaintiff's vessels or otherwise violating, or inducing or causing others to violate, defendant's existing collective bargaining agreement as amended with plaintiff and for such other, further and different relief as the Court may deem just in the premises; and it is

FURTHER ORDERED, that service of a copy of this order together with a copy of the affidavit annexed hereto in the [20] manner prescribed by Title III, § 301(d) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(d) on or before September 17, 1957, at 3:00 P. M. shall be sufficient.

Dated: Brooklyn, N. Y.
September 16, 1957

s/ WALTER BRUCHHAUSEN
U. S. D. J.

Affidavit of Milton Williams

* * *

[21] MILTON WILLIAMS, being duly sworn, deposes and says:

1. I am Vice President in charge of operations of A. H. BULL & Co., INC., a subsidiary of plaintiff, A. H. BULL STEAMSHIP Co., engaged in operating plaintiff's American-flag, ocean-going, dry cargo vessels. Since 1936, with the exception of four and a half years in service from 1941 to 1946, I have represented plaintiff in its labor negotiations with the various maritime unions with which plaintiff has had in the past, and now has, collective bargaining agreements.

I make this affidavit in support of plaintiff's application for an order to show cause why defendant, Seafarers International Union of North America, Atlantic and Gulf District, AFL-CIO ("SIU" herein) should not be enjoined *pendente lite* from striking or otherwise violating its collective bargaining agreement with plaintiff.

2. For several decades plaintiff and its affiliated companies have engaged in the ocean transportation of freight [22] and passengers in interstate and foreign commerce. Plaintiff currently maintains dock and terminal facilities in the Ports of New York, Philadelphia, Baltimore and San Juan, Puerto Rico. Its vessels regularly call at these and other American and foreign ports to receive and discharge cargoes and passengers.

3. Throughout the time that I have handled Bull's labor relations defendant SIU (or its predecessors) has acted as the collective bargaining agent for the unlicensed seamen employed aboard plaintiff's American-flag vessels. Plaintiff's labor relations with the SIU have always, within my memory, been governed by a formal, written collective bargaining agreement. The current agreement, as amended in October of 1956, will not expire by its terms until September 30, 1958. A copy of this collective bargaining agreement, as amended, is attached to the complaint herein as Exhibit A thereto.

Affidavit of Milton Williams

This agreement constitutes the SIU's standard "Freightship Agreement," and is presently in full force and effect and binding upon, not only every shipping company, including plaintiff, which is signatory thereto, but also, of course, upon the SIU.

4. There is contained in this agreement, and has been in every such agreement between the SIU and the shipping companies with which it holds such agreements, since 1940 the following "no strike" clause:

> "Stoppage of Work. There shall be no strikes, lockouts or stoppages of work while the provisions of this agreement are in effect." (Complaint, Ex. A, Art. II, Sec. 4)

5. In 1947, and at the insistence of the SIU, it was agreed by the various shipping companies contracting with it that, during the life of this collective bargaining agreement [23] and any extensions thereof, any party could at any time reopen the contract and negotiate changes in the "wage scale or any monetary matters."

I was a member of the negotiating committee in 1947 when the inclusion of such a wage reopener in the collective bargaining agreement was discussed. At that time the Union made it abundantly clear that its purpose in insisting upon such a clause derived from the fact that other maritime unions representing unlicensed personnel enjoyed contracts which expired prior to the expiration date of the SIU standard agreement. Thus, wage increases secured by these other unions, many of which are directly competitive with the SIU, regularly became effective prior to any increases which the SIU might later secure from the companies with which it contracted. At no time in these discussions or thereafter did the Union ever intimate or suggest that such a wage reopener would, in effect, repeal the "no strike" clause. Never during the course of these discussions or thereafter did the Union ever intimate or suggest that a reopening of the contract was authorized for any

purpose other than securing for SIU members the same, or at least similar, wage benefits which other maritime unions might have secured at the time. On the contrary, the Union made it clear that, if economic conditions should turn downward and the companies request a wage reduction which the Union would not accept, the companies would have no right to take economic action against the seamen.

In other words, it was at all times mutually understood and agreed that the wage reopener would affect no other provision of the collective bargaining agreement and, specifically, would not in any manner nullify or modify the "no [24] strike—no lockout" clause of the contract. Indeed, it was expressly provided in the preamble to the agreement that "Applications by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement."

6. Nevertheless, despite the "no strike" clause (which, as noted, was in the contract seven years prior to the adoption of the wage reopener and has remained unchanged in seventeen years in all), and despite the fact that plaintiff has in good faith offered defendant the same 6% increase in the industry scale achieved by defendant's competitor unions in June of this year (effective as of the earliest date that such increase can become effective on any SIU-contract vessel), the SIU has singled out plaintiff of all the sixty-odd companies which it has under contract and has struck its vessels, resulting at the present time in the idling of six vessels normally engaged in plaintiff's regular New York-to-Puerto Rico service and generally disrupting plaintiff's other services.

7. There can be no doubt as to the reason why the SIU has undertaken at this time to wage economic warfare against plaintiff. In December of last year, stock ownership of plaintiff passed from its former stockholders to American Coal Shipping, Inc., a corporation recently organized for the primary purpose of transporting American-

produced coal to Europe. Defendant SIU is, I understand, currently engaged in a dispute with its principal competitor, the National Maritime Union, AFL-CIO, over representation of the unlicensed seamen employed aboard the vessels of American Coal Shipping. Neither I nor any other person engaged in plaintiff's operations have participated in [25] any way in our parent company's union problems. It is apparent to me from the repeated statements of SIU officials that it seeks, by the current strike against plaintiff, to gain some advantage in its contest with the National Maritime Union over representation of American Coal Shipping seamen. Be that as it may, Mr. Paul Hall, SIU Secretary-Treasurer and its principal officer, has again and again, in my presence, affirmed that the SIU has, in labor parlance, "no beef with the Bull Lines."

I further understand that the employment of merchant seamen aboard American Coal Shipping vessels is being conducted under a decree issued by the United States District Court for the Southern District of New York, and that there are also presently pending before the National Labor Relations Board a number of unresolved charges of unfair labor practices, none of which in any respect relate to or affect any phase of plaintiff's operation, its vessels, or its employees. I have also been informed that the NLRB is currently processing a petition for a representation or certification election aboard the American Coal Shipping vessels.

8. It is against this background that the "negotiations" which preceded defendant's current strike against Bull must be assessed:

(a) In the late spring of this year, it was announced that the American Merchant Marine Institute had, as a result of negotiations with the National Maritime Union and other labor organizations, agreed to an across-the-board 6% wage increase on all American-flag vessels under contract with those unions.

[26] (b) Thereafter and on June 17, 1957, defendant SIU notified all companies which it had under contract, including plaintiff, of its desire pursuant to its collective bargaining agreement, "to open negotiations for a revision of wages and other monetary matters." No other purpose or subject of negotiations was specified. On June 24, at a meeting attended by various representatives of the SIU-contract shipping companies, Mr. Hall verbally announced that the Union was demanding *either* a 50% to 100% wage increase, double vacation pay, and other equally fantastic revisions, *or, in the alternative,* a 6% wage increase across-the-board, plus "guaranteed employment" for SIU men aboard "company vessels." At this meeting Mr. Hall expressly informed plaintiff's representatives that he would deal only with plaintiff's "principals" in any ensuing negotiations.

(c) Thereafter on July 2, July 10, and July 15, I met, together with other of plaintiff's representatives, including counsel, with Mr. Hall. On each of these occasions Mr. Hall repeatedly assured us that he had no wage dispute with plaintiff and proceeded in great detail to relate the problems his union was allegedly having in its fight with the National Maritime Union over the representation of American Coal Shipping seamen. On each of these occasions we, on behalf of plaintiff, offered to grant an immediate 6% increase to our licensed seamen in line with the industry pattern accepted in June by the companies represented by the American Merchant Marine Institute. We also repeatedly offered to submit any additional monetary matters to arbitration. We also offered to join with the Union in seeking federal mediation of any bona fide controversy between the SIU and plaintiff. [27] Mr. Hall uniformly reverted to American Coal Shipping and to various changes he wished to effect in American Coal Shipping's employment practices. At no point did he evince any genuine interest or concern over "wages or other monetary matters."

(d) As a result of these conversations Mr. Hall, if he did not appreciate the fact already, was made to realize that

plaintiff could never agree to a wage scale substantially in excess of the industry pattern and remain an effective competitor in the maritime industry. Knowing this and knowing that never in the history of collective bargaining in this industry has there been a substantial discrepancy between the wage scale on one company's vessels and those of the industry in general, Mr. Hall, nevertheless, on August 15, 1957, delivered to me the Union's "final offer" to plaintiff, an offer demanding, among other things, that, effective July 1, 1957, the wage, overtime and penalty rates through all classifications of plaintiff's unlicensed seamen would be increased 20%.

(e) Thereafter, on August 19, defendant began picketing plaintiff's vessels at its Brooklyn terminal, resulting in a total stoppage of all work by defendant's seamen and many other of plaintiff's employees who have refused to cross picket lines. Within a week four vessels were, and still today are, strike-bound in Brooklyn.

(f) On September 11, despite the unsuccessful intervention of federal conciliators, defendant spread the strike to San Juan, tying up two more of plaintiff's ships and virtually closing down plaintiff's regular New York-to-Puerto Rico service. Defendant's officers and agents are now threatening further strike action at the ports of Philadelphia and Baltimore.

[28] 9. In view of the foregoing, it is apparent that defendant has no dispute with plaintiff but is simply exercising its undoubted economic power against plaintiff for the sole purpose of putting pressure upon American Coal Shipping, plaintiff's parent corporation. I, of course, am not competent or even inclined to comment upon the legality of SIU's taking such action in the face of the decree of the United States District for the Southern District of New York. I am certain, however, that plaintiff is, in defendant's eyes, merely a pawn in its struggle for representation of plaintiff's parent company's unlicensed seamen.

Obviously, if the defendant persists there is no way out for plaintiff unless the defendant be compelled to respect and abide by the provisions of its collective bargaining agreement. As counsel will demonstrate in the memorandum to be submitted with this application, there can be no question but that defendant's present strike is in violation of that agreement and that plaintiff is entitled to have such violation enjoined.

10. That plaintiff's legal remedy for damages is inadequate in the present circumstances is obvious. Plaintiff is a going concern in a highly competitive industry. Not only has the present strike removed effective units from plaintiff's fleet which otherwise would be available for the transportation of cargoes anywhere in the world, but more important—and more directly affected—is the complete disruption of plaintiff's regular service from New York, Philadelphia and Baltimore to San Juan and return. Plaintiff is every day losing assured business from longstanding customers who over the years have come to depend upon the reliability of plaintiff's service for [29] their shipments. With the loss of this business goes the loss of the concomitant good will which plaintiff has achieved over the years. Unless plaintiff can resume its service immediately it may have lost this business permanently to competitors who have already actively entered the trade.

Moreover, if this strike continues a serious question will arise as to this defendant's financial resources to answer for any substantial monetary judgment which may be entered against it ultimately in this action. In this regard, the Court will note that plaintiff's damages as of today, as alleged in the complaint, are in excess of $160,000 (limited to the damages sustained by reason of the six ships strikebound at New York and San Juan and without regard to the loss of actual profit or of good will). These damages, of course, will continue to accrue each day the strike continues.

Affidavit of Milton Williams

Unless defendant's unlawful strike is promptly enjoined plaintiff will continue to suffer great and irreparable injury for which it has no adequate legal remedy.

11. Plaintiff asks to proceed by order to show cause because the continuing nature of the damage which it is sustaining necessitates a prompt hearing of the within application and insufficient time is available for proceeding by notice of motion before this Court's next motion day on September 18, 1957.

12. No prior application for such an order to show cause as is submitted herewith has been made to this Court or to any judge thereof.

[30] WHEREFORE, on behalf of plaintiff, A. H. Bull Steamship Co., I submit that an order to show cause should issue herein and that, upon its return, this Court should issue its injunction *pendente lite* enjoining the defendant, its officers, agents, employees, members and attorneys and all persons acting in concert with it from inciting, causing or engaging in any strike or work stoppage affecting plaintiff's vessels or otherwise violating, or inducing or causing others to violate, defendant's existing collective bargaining agreement as amended with plaintiff.

MILTON WILLIAMS

(Verified September 16, 1957.)

[Exhibit (Copy of Complaint printed at pp. A 2-A 5) omitted.]

Notice of Cross-Motion to Dismiss Complaint

• • •

[48] Sirs:

Please Take Notice that the undersigned will cross-move this Court, upon return of the order to show cause herein, for an order

1) dismissing the complaint for failure to state a cause of action; or, in the alternative,

2) for an order

(a) Dismissing that part of the action seeking an injunction on the ground that the Court does not have jurisdiction to grant the relief so requested;

(b) Dismissing that part of the action seeking a declaratory judgment on the ground that all the matters and issues involved therein are involved in and fully determinable by proceedings already pending in the Supreme Court of the State of New York, Kings County, and that, in any event, the claim herein for damages obviates the need therefor; and

(c) Staying further proceedings in this case upon the ground that there is an action pending in the Supreme Court of the State of New York, in and for the County of Kings, between the same parties, bearing Index number 9861/1957, for injunctive relief based on the same alleged breach of contract alleged herein, or, in the alternative,

[49] 3) for an order staying all proceedings with respect to all the issues herein on the ground of the pendency of a prior action as hereinabove set forth.

Wherefore, defendant requests this Court to dismiss the complaint herein, or to grant an alternate order as herein-

Notice of Cross-Motion to Dismiss Complaint

above prayed, and for such other, further or different relief as the Court may deem just and proper.

Dated: Brooklyn, New York
September 18, 1957.

Yours, etc.

SEYMOUR W. MILLER
Attorney for Defendant
Office & P. O. Address
26 Court Street
Brooklyn 1, New York

To:

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.,
Attorneys for Plaintiff
2 Wall Street
New York 5, New York

Affidavit of Seymour W. Miller

• • •

[50] SEYMOUR W. MILLER, being duly sworn, deposes and says:

I am attorney for the Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, the defendant herein, and am personally familiar with the facts hereinbelow set forth. I make this affidavit in support of defendant's request for adjournment of the hearing on plaintiff's application for an order enjoining defendant from a peaceful strike and picketing in support of wage demands on reopening.

This is the third attempt within one month, whereby A. H. Bull Steamship Co. (Bull herein) has sought to enjoin the defendant, Seafarers' International Union, etc (SIU herein) from striking in the course of a labor dispute between the two parties. In each prior instance, Bull brought its applications on by orders to show cause, and in each such instance the SIU answered promptly and with dispatch.

Bull's first application for an injunction was denied by Judge Cone with leave to amend. At the time of the hearing on the second application, it was the plaintiff herein, Bull, which requested additional time of the Court to file a brief. Additional time was granted, and the papers, briefs, are still before Mr. Justice Brown, who has not yet rendered his decision. [51] In other words, while its second application for an injunction against SIU is still pending before the Supreme Court of the State of New York, Bull has applied to this Court for precisely the same relief.

These facts are set out to place plaintiff's position in proper focus, because defendant is forced to request an adjournment of the instant application. Ordinarily, and notwithstanding the paucity of time allowed defendant to defend itself, SIU would, as it has done previously, answer the order to show cause on the date set therefor without

any request for adjournment. However, defendant is presented with the problem of defending additional orders to show cause served upon SIU on Monday morning, Sept. 16, 1957, prior to the Monday afternoon service of this order to show cause. The prior order is in connection with a newly brought action in the Supreme Court of the State of New York, in and for the County of New York, returnable on September 18, 1957, at Special Term, Part III, at 10:00 o'clock in the forenoon. The title of the case is Ameritogs, Inc., et al., v. A. H. Bull, et al., Index #10739—1957.

This fourth order to show cause likewise arises from SIU's strike in furtherance of its labor dispute over wages with Bull. It is brought by certain shippers and seeks, inter alia, to enjoin the SIU from picketing and other actions in connection with its strike. The plaintiffs therein also seek a mandatory injunction to compel Bull to deliver, or make available for delivery, their merchandise.

In view of the foregoing, especially in light of the fact that Bull seeks here, for the third time, relief which has already been denied it by a court of law, and that defendant's attorney will be actually engaged in another matter evolving from the same labor dispute, it is respectfully submitted that it is just and proper that the adjournment herein sought be granted.

THEREFORE, your petitioner respectfully prays that the hearing on the within application be adjourned one week to the next regular scheduled hearing of motions by this Court.

s/ SEYMOUR W. MILLER
Seymour W. Miller

(Verified September 17, 1957.)

Affidavit of Paul Hall

• • •

[52] PAUL HALL, being duly sworn, deposes and says:

1. I am Secretary-Treasurer of the Seafarers International Union of North America, Atlantic and Gulf District, AFL-CIO (hereinafter referred to as "SIU"), defendant herein, and make this affidavit in opposition to the motion of plaintiff for a temporary injunction, and in support of defendant's cross-motion to dismiss the complaint.

2. The office of Secretary-Treasurer of defendant is the chief executive office of the said union. I have occupied that office, as a result of several elections held in the interim, from 1948 to date. Between 1945 to 1947, I was New York Port Agent of the defendant. I have been a member of all of defendant's negotiations committees from about 1945 to date, and have actively participated in all contract and wage negotiations of the defendant from 1945 to date. I am very familiar with union-management relations in general, and in the maritime field in particular.

[53] 3. While counsel will undoubtedly elaborate in briefs and oral argument on this point, I state categorically that Mr. Williams' affidavit, insofar as it relates to the intent or effect of the clauses he sets forth, is not only erroneous in fact, but demonstrably disprovable on its face. I recall the 1947 negotiations, in which the reopening clause was bargained for and obtained. As that clause clearly indicates, it was intended to, and does, permit defendant to reopen for monetary matters at any time. Notwithstanding that, as Mr. Williams agrees, the SIU "insisted" the reopening clause set forth on page 4 of his affidavit, he states that, nevertheless, it was never the intention to permit a strike in support of demands made on such reopening. I can only reply that it is simply not conceivable to me, or, in my opinion, to anyone even remotely connected with collective bargaining, that a union would, in the course of collective bargaining sessions, "insist" on a wage reopen-

ing clause, knowing that the concomitant right to strike, if wage issues and reopening cannot be resolved, does not exist. The right to reopen, without the right to strike, is nothing. A union may, quite obviously, ask its contracted companies to talk at any time. Yet, ridiculous as it seems, Mr. Williams is telling the Court that this union seriously and deliberately "insisted" on and negotiated a clause giving it no more than the right to ask the companies to talk; in other words, it "insisted" on and negotiated something it already had, and which is meaningless if divorced from the right to take economic action to enforce its demands. I say, therefore, that not only was it not the intent to deprive SIU of the right to strike to support reopening demands, but that it is impossible to so construe the contract on any reasonable basis. I find it most difficult to understand how Mr. Williams, whom I have known well for many years, can opine that this union ever bargained for the "right" to engage in unenforcible talk.

Now, on page 4 of Mr. Williams' affidavit, he sets forth the clause which he says makes it clear that the right to reopen did not carry with it the right to strike. For purposes of continuity, we reproduce that clause here:

> [54] "Applications by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement."

As stated before, I participated in the 1947 negotiations and I know that that clause didn't have the slightest thing to do with strikes. The purpose of that clause was to help both the SIU and the Employers. The former is helped in that, notwithstanding a reopening on monetary matters, and even a resultant impasse, or an ensuing strike, the contract is still not terminated, so that the door is not open for a rival union to walk in, on the premise the Employer

has no collective bargaining agreement at all. The Employer is helped in that, since the contract is not terminated, it is clear that the issues on reopening can only be those concerned with monetary matters. The whole contract may not be thrown open, with all its myriad and important provisions, such as working rules, manning scales, etc. That and that alone, is what was intended to be accomplished by providing for no termination of the agreement upon a reopening.

Mr. Williams refers specifically to the no-strike clause. Let us, however, not take this clause out of context, but, instead, refer to the whole agreement (Exhibit "A" annexed to the complaint). It will then be clear as to what the no-strike clause really refers.

Article II, Section 3 of the agreement reads as follows:

> "For the adjustment of any grievances arising in connection with performance of this agreement which cannot be satisfactorily adjusted on board the vessel there shall be established a Port Committee at the port where articles are terminated. The Port Committee shall consist of 3 representatives from the Union and 3 representatives from the Company, and it shall be the duty of the Port Committee to meet within 24 hours, Saturdays, Sundays and Holidays excluded. In the event the Port Committee cannot agree they shall select an impartial arbitrator whose decision shall be final and binding. In the event the Port Committee cannot agree on the selection of an impartial arbitrator, then a judge of the District Federal Court shall appoint an impartial arbitrator whose decision shall be final and binding. Expenses of the arbitrator shall be paid by the party whom the arbitrator rules against in the decision."

[35] This is the only arbitration clause in the entire agreement, apart from the patently inapplicable provisions,

in Article I, designed to resolve disagreements among the members of the Seafarers Appeals Board, which has jurisdiction over the seniority and shipping rights of individual seamen. There is no other arbitration clause. Article II, Section 3, however, patently refers only to grievances aboard ship, as the plaintiff will undoubtedly concede. It would be downright silly, for example, to think of a Port Committee settling wage review issues. Now, Section 4, immediately following this grievance procedure clause, contains the "no-strike" clause set forth by Mr. Williams at page 2 of his affidavit. Thus, it is apparent that, having provided another method of settling shipboard disputes, the parties immediately thereafter agreed there would be no strikes, lockouts, or stoppages of work. This makes sense. While the Union gives up its right to strike in connection with shipboard "beefs", there is a remedy it can pursue if it feels the seamen have been aggrieved. But, what does the Union have if the Employers refuse to accept demands made on wage reopenings? The answer, once again, according to plaintiff, is that all the reopening clause does or can do is to give us the "right" to ask the companies to please talk to us. Quite bluntly, I have never heard of a more ridiculous construction, not only as a matter of actual fact as to what was intended, but also as a matter of elementary common sense. Anyone who knows the SIU (as Mr. Williams does) knows that it, of all unions, does not have to have contracted permission before it talks to the Employers about increased wages or anything else.

Mr. Williams indicates that his interpretation is proven because the Union never before caused a strike to enforce demands in wage reopenings. The most obvious answer to this is that we have never before reached an impasse on wage reopenings.

[56] I am personally familiar with the reasons for insisting upon an unlimited wage reopening in 1947. It is no secret to anyone familiar with the maritime industry that to this day, and not only in 1947, there was a host of

unions in the maritime field, each comprising either all types of unlicensed seamen, or crafts of unlicensed seamen. For example, there was not only the National Maritime U. on, C. I. O., but also, the Marine Cooks and Stewards, the Sailors Union of the Pacific, the Marine Firemen, Oilers and Watertenders, the Pacific District of the Seafarers International, and others. The contract expiration dates of these unions differed largely and, of course, each union sought to win for its members at least the same, if not better, gains won by others. In order to obviate the need to wait until expiration date to accomplish this, we sought and won the unlimited (as to time) reopening now in the contract. This is pretty much what Mr. Williams says in his affidavit. But, this is procedure. Suppose we do talk at any time. What do we do if the Employers say no? What has the clause given us in such a case, this clause which Mr. Williams says we "insisted on"? The answer, according to Mr. Williams, is that, in effect, we demanded nothing and got nothing. I am sorry, but I don't believe Mr. Williams really means this, even though he is saying it.

It is submitted, then, that this strike, a strike in support of economic demands properly made upon, and rejected by, plaintiff, is clearly within the rights of defendant and in no way a breach of contract.

Mr. Williams says we "singled out" plaintiff. I say he knows we have not signed any wage increase agreement with any of our other contracted companies and that we have established no wage increase pattern with them. What Mr. Williams is attempting to imply is that, because NMU has received a 6% increase, we are under some sort of a duty to accept the same package. Merely to make this statement is to illustrate how ridiculous it is.

[57] Mr. Williams makes various allegations concerning American Coal, and what I said in conversations with him. I must first observe that even Mr. Williams concedes

our right to reopen. Pursuant thereto, we asked for a wage increase. After discussions, Bull refused to accept our final offer. Bull stated that it would pay only the referred to 6% increase. It never—and Mr. Williams knows this, despite what he says—offered to pay 6% and then arbitrate an increase beyond that figure, although I hasten to add that there is no arbitration clause in our agreement covering such matters and that we are thus under no duty whatever to arbitrate, once an impasse over wages has been reached. However, I make this statement only to emphasize Mr. Williams' misstatement. More to the point, I don't see how this Court can validly be placed in the position of putting some sort of ceiling on our demands—in other words, in effect writing a contract for the parties. On the other hand, as counsel will undoubtedly elaborate upon in briefs, if there is something unfair about our bargaining, let plaintiff complain to the NLRB, the agency set up by Congress to decide such matters—although even there, I am informed, the Board is without power to write a contract for the parties.

In my negotiations with Mr. Williams, wherein he alleges I said we have "no beef with the Bull Lines", I vigorously deny any such statements. In fact, Bull Lines points up the special problem faced SIU with a number of its contracted companies. Some of them have already been merged with or bought out by companies having contracts with NMU, to whom we have lost some of our ships. The cloud of insecurity hovering over SIU is even greater with Bull because it is owned, lock, stock, and barrel, ⅓ by coal mine operators, ⅓ by coal-carrying railroads, and ⅓ by the United Mine Workers, headed by Mr. John L. Lewis, the latter union, "our boss", being an avowed labor enemy of SIU, and who deliberately entered into an illegal contract with NMU, the subject of legal proceedings elsewhere. The Mine Workers subsidized the notorious ILA when SIU was spearheading the AFL fight for decency on the New York waterfront. The Mine Workers, particu-

larly its District 50, headed by Mr. Lewis' brother, Denny, [58] was recently defeated in a contest with us over the harbor tugs in Baltimore. It is sworn to destroy us and, as it can be seen, the other stockholders who own Bull are dependent on the Mine Workers for their profits. In truth, then, our worst labor enemy is our boss in Bull. How. then, do we take care of this? How long will we keep our ships? How soon will they be transferred? How is this insecurity to be measured? Is the Court to do the measuring? Or is it to be the seamen themselves, the ones whose interests are threatened? We hold it is the latter who, in their considered judgment, have made certain wage demands upon Bull. The insecurity of our position, vis-a-vis Bull, is indeed occasioned by its ownership. But, let me emphasize this clearly, our dispute here is with Bull, and with Bull alone. At no time, directly or indirectly, did I make demands upon Bull other then wage demands. I made it crystal clear that, in our judgment, the cloud of insecurity over our heads is responsible for our demands, seriously and painstakingly considered by our people. Our dispute with American Coal proper is elsewhere, in the Courts and with the Board. Here, then, there is only one dispute—a wage dispute, on reopening, with Bull Lines—nothing more, nothing less. Our wage demands upon Bull are predicated on our insecurity with Bull—nothing more, nothing less. Our members seek compensation therefor and have set their wage demands accordingly—nothing more, nothing less. Having reached an impasse, we set out on a peaceful economic strike. Can this Court validly deprive us of this right? Should this Court deprive us of this right? We answer, in all respect, no. Plaintiff may attempt to muddy the waters—indeed, as counsel informs me, the same arguments were advanced, in open Court, by counsel in two previous State court proceedings to no avail, so far. Plaintiff cannot, should not, be allowed to go "across the street" and obtain a different result.

Affidavit of Paul Hall

[59] I have read the accompanying affidavit of Claude Simmons and, of my own personal knowledge, I affirm the truth thereof and adopt and reiterate the same, as if actually made a part hereof.

WHEREFORE, it is prayed that the motion for a temporary injunction herein be denied and the cross-motion to dismiss the complaint herein be granted.

.....

PAUL HALL

(Verified September 18, 1957.)

Affidavit of Claude Simmons

• • •

[60] CLAUDE SIMMONS, being duly sworn, deposes and says:

I am Assistant Secretary-Treasurer of the defendant union herein (hereinafter referred to as SIU) and make this affidavit in opposition to plaintiff's motion for a temporary injunction, and in support of defendant union's cross-motion to dismiss the complaint.

I have been Assistant Secretary-Treasurer of the SIU since January, 1952, having been duly returned to office during the interim as a result of several elections. While I have participated in some negotiations with our contracted Employers (including plaintiff) prior to that time, I have been a member of the SIU's negotiating committee in every negotiating session since January, 1952. It is also a part of my official duties to "police" and effectuate the enforcement of each and every collective bargaining agreement to which the SIU is a party. I discuss our contract with Employers each and every working day. I have been an active member of the SIU since its inception, about 19 years ago, and I am well acquainted with the history of maritime trade unionism since 1938, particularly with respect to collective bargaining issues and developments since that time. In the light of this background, I can say that, to my own personal knowledge, it has never been questioned by anybody that [61] our collective bargaining agreement did not prohibit a strike on wage reopening, nor has it ever been suggested to me by anybody that the intent of the clause was merely to give us a right to talk. It is not credible to me how anyone in the maritime industry can believe that.

Pursuant to our collective bargaining agreement (Exhibit "A", annexed to the complaint), and in accordance with my usual procedure in notifying our contracted Em-

ployers that we desire to reopen on monetary matters, I dispatched, on June 17, 1957, the following telegram to plaintiff:

> "Pursuant to our collective bargaining agreement between your company and the Seafarers International Union of North America, Atlantic and Gulf District, we hereby notify you that we wish to open negotiations for a revision of wages and other monetary matters. We request that you meet with us on Monday, June 24th, at 2:00 P. M. in the offices of the Seafarers Welfare Plan, Room-1060, 11 Broadway, New York, N. Y."

Subsequently, the Union's negotiators met with the negotiators of plaintiff, but no agreement was reached. On August 15, 1957, I caused to be sent, to plaintiff, the Union's final offer, after being advised by Paul Hall, the SIU Secretary-Treasurer, that he had communicated this offer to Mr. Williams over the phone. The offer set forth our final and minimum monetary demands with respect to overtime pay and wage increases. On August 16, 1957, the plaintiff wired the SIU, in answer to the SIU's final offer, to the effect, inter alia, that it was ready to offer an increase less than that which was submitted by SIU as the minimum it would accept. On August 19, 1957, SIU entered into the strike upon which the present action is predicated.

I am in charge of the picketing which is currently taking place at the entrance to plaintiff's piers, where its ships are tied up, in Brooklyn. There are two entrances, one on 20th Street, and one on 21st Street. We commenced our picketing with about 4 pickets at each entrance. But, after the first day, I reduced the number of pickets, so that there is now only one [62] picket at each entrance. A picket captain looks after the needs of the pickets, and I check the lines several times each day and night. The pickets have been directed to avoid violence in any way, shape or form.

These directions have been carried out to the letter. There are policemen around, but they haven't done anything, nor do I know who called them or why they are there. There have been no incidents of any kind, no violence of any kind, no disorder, no mass picketing, no foul language (indeed, hardly any language at all). The picket signs state merely that the SIU is on strike against A. H. Bull S. S. Company for better pay. Completely analogous conditions prevail in Puerto Rico. In other words, this is an entirely peaceful, orderly, primary strike occasioned by the failure of the parties to resolve economic demands made pursuant to contract. As before indicated, this strike is not in breach of contract and was contemplated by the parties in granting the SIU's demands for the wage reopening clause hereinbefore set forth.

WHEREFORE, it is prayed that the motion for a temporary injunction be denied and the cross-motion to dismiss the complaint be granted.

s/ CLAUDE SIMMONS

(Verified September 18, 1957.)

Affidavit of Seymour W. Miller

[63] SEYMOUR W. MILLER, being duly sworn, deposes and says:

I am the attorney for the defendant herein. I make this affidavit in opposition to plaintiff's motion for a temporary injunction and in support of defendant's cross-motion to dismiss the complaint.

On August 27, 1957, plaintiff herein instituted proceedings by order to show cause, dated August 23, 1957, the affidavit of Milton Williams, sworn to August 22, 1957, and a complaint, verified by the said Williams August 22, 1957. The action was brought in the Supreme Court of the State of New York, County of Kings (Index #9861/57), and the proceedings were directed towards the issuance of a temporary and permanent injunction against defendant's strike and picketing of plaintiff's vessels. It was alleged that the strike and picketing were in breach of contract and did not constitute a labor dispute within the meaning of New York's little Norris-LaGuardia Act (Sec. 876-a of the Civil Practice Act). Except that no demand for a declaratory judgment or damages was made, the issues there were precisely the same as in this case. The Court, per Mr. Justice Cone, sitting in Special Term, Part I, denied the motion for a temporary injunction and dismissed the complaint, a decision predicated on the coverage of the case by New York's little Norris-LaGuardia Act. The said affidavit of Mr. Williams, the said complaint, and the said decision, are annexed hereto, made a part hereof, and labeled "Exhibit A", "Exhibit B", and "Exhibit C", respectively.

[64] On September 9, 1957, plaintiff, again by order to show cause, brought on a new application, in the same Part of the same Court, for the relief previously denied. In support thereof, it filed an amended complaint, verified by Mr. Williams on the 4th day of September, 1957, in addition to a new affidavit by Mr. Williams, sworn to September 3rd,

1957. The said new affidavit of Mr. Williams, and the said amended complaint, verified by Mr. Williams, are annexed hereto, made a part hereof, and labeled "Exhibit D" and "Exhibit E", respectively. This second application was pending at the time this proceeding was instituted, and is still pending.

I was present in Court on August 29, 1957, and on September 9, 1957, the days on which oral argument was had on the aforesaid two orders to show cause. In fact, I argued the motions on behalf of the defendant herein. Mr. Cherbonnier, of Satterlee, Browne & Cherbonnier, argued for the plaintiff herein. The papers presented, as can be seen from the exhibits, and his oral arguments, consisted of, for all practical purposes, precisely what is now before this Court, and were disposed of as indicated in the aforesaid decision, while a decision on the second application is still forthcoming. All that is new here is the demand for declaratory relief and damages.

SEYMOUR W. MILLER

(Verified September 18, 1957.)

[65]

EXHIBIT "A"

STATE OF NEW YORK }
COUNTY OF NEW YORK }

MILTON WILLIAMS being duly sworn deposes and says:

I am Vice-President in Charge of Operations of A. H. Bull & Co., Inc. I have represented our steamship lines in labor negotiations since 1936 with the exception of 4½ years spent in the service from 1941 to 1946.

Negotiations with the Seafarers' International Union of North America, which I shall hereafter refer to as SIU, and its predecessors have always been carried on by an informal negotiating group representing the majority of companies having contracts with the SIU.

Upon completion of the negotiations the contracts were signed by the individual companies and the Union.

I have been a member of the Negotiating Committee since 1946. The Negotiating Committee varied in size, increasing as the years went by and additional companies desired representation on the Negotiating Committee until it reached a point where the Committee usually consisted of five or six representatives.

As of 1946, when I took my position on the Negotiating Committee, the uniform contracts between the SIU and the companies whose employees were represented by the Union contained the following "no strike" provision:

> "There shall be no strikes, lockouts, or stoppage of work while the provisions of this agreement are in effect."

The agreement as of that date did not provide for any reopening on monetary matters during its term; however, during negotiations leading up to the execution of the 1947 agreement between the SIU and the companies which it had

under contract, the Union pointed out that other maritime unions representing unlicensed personnel had contracts with companies whose employees [66] were represented by those unions whose contracts expired at various dates prior to the expiration date of the SIU agreement. Due to this fact increases negotiated by these other unions, which are directly competitive with the SIU, regularly became effective prior to the increases or other contract modifications negotiated by the SIU. The SIU demanded that its standard agreement be amended to include a wage reopening provision which would permit it to follow whatever industry pattern was set by the other unions in their negotiations without waiting for the expiration date of the SIU contract. This demand was agreed to by the companies under contract to the SIU and the language reflecting that agreement is now contained in the preamble to the standard agreement between those companies and the Union.

As one who personally participated in the negotiations with the SIU which led to this contract modification I can say that it was never the intention of the companies represented by the Negotiating Committee to modify in any way the "no strike" clause so as to permit a strike in support of the newly adopted wage reopening clause. In other words, it was the intention of the companies to permit the contract to be reopened on wages so that the SIU would not lag behind other maritime unions representing unlicensed personnel in securing monetary increases for the employees represented by the SIU but without in any way qualifying the absolute prohibition against strike already included in previous agreements between the companies and the SIU and which has been carried forward to the present day without any modification. So that this would be clearly understood the Union agreed to incorporate in the reopening clause the following:

> "Applications by either party to open negotiations for changes in the wage scale or any monetary mat-

ters any time during the life of this agreement shall not be deemed cause for termination of this agreement."

[67] That this is the correct interpretation of these contract clauses as evidenced by the fact that at no time since adoption of the wage reopening clause has the Union caused a strike or work stoppage against any of the dry cargo carriers who have signed the same agreement to enforce any demands made by the Union under the wage reopening clause.

Submitted with this affidavit is a copy of the complaint which I have verified on behalf of the plaintiff in this action and which I incorporate by this reference in this affidavit. As will be seen from the complaint the individual defendants herein and the defendant Union have caused through picketing and other means a total work stoppage aboard plaintiff's vessels, the SS FRANCES and the SS KATHRYN, presently at plaintiff's Brooklyn pier. This work stoppage clearly violates the "no strike" clause of the present collective bargaining agreement between plaintiff and defendant Union.

This unlawful strike has already caused plaintiff great and irreparable injury through the tie-up of these two vessels with a consequent loss of substantial freight business to plaintiff's competitors. Unless this unlawful strike is promptly enjoined, plaintiff will continue to suffer great and irreparable injury for which no adequate legal remedy exists.

In addition to the damage caused plaintiff by virtue of the present delay in the movements of the SS FRANCES and the SS KATHRYN plaintiff has other vessels, which, in the next few days, are scheduled to arrive in New York and whose operations would necessarily be affected unless defendants are enjoined.

Exhibit "A"

Plaintiff has no adequate legal remedy because the damage done to plaintiff's position in the shipping industry and to its good will amongst its customers is incalculable in monetary terms.

Plaintiff asks to proceed by an Order to Show Cause because the damage presently being suffered by the continuing acts and activities of the defendants herein necessitating a prompt hearing and disposition of its application for an injunction *pendente lite*.

[68] No previous application has been made for the relief sought herein to any Court of Justice thereof.

WHEREFORE I respectfully submit that an injunction *pendente lite* substantially in the form set forth in the Order to Show Cause submitted herewith should issue forthwith.

s/ MILTON WILLIAMS

(Verified August 22, 1957.)

[69]

EXHIBIT "B"

COMPLAINT FOR INJUNCTIVE RELIEF

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

A. H. BULL STEAMSHIP COMPANY,
Plaintiff,

against

PAUL HALL, as Secretary-Treasurer, and CLAUD SIMMONS, EDWARD MOONEY and JOSEPH ALGINA each as Assistant Secretary-Treasurer of the SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, and

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, a labor organization affiliated with the American Federation of Labor and Congress of Industrial Organizations,
Defendants.

Plaintiff, A. H. BULL STEAMSHIP COMPANY, by SATTERLEE, BROWNE & CHERBONNIER, its attorneys, alleges upon information and belief as follows:

1. Plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Delaware and is engaged in and carrying on a business affecting commerce, to wit, that of a common carrier by water in foreign and intercoastal trade with its principal office at 115 Broad Street, New York, New York and within the jurisdiction of this Court.

2. The defendants PAUL HALL, as Secretary-Treasurer and CLAUD SIMMONS, EDWARD MOONEY and JOSEPH ALGINA, each as Assistant Secretary-Treasurer (hereinafter called individual defendants) are citizens of the State of New York and defendant, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO (hereinafter called Union) is and at all times hereinafter mentioned was and at the time of the filing of this complaint is a voluntary unincorporated association, to wit, a labor organ zation with its principal office located at 675 Fourth Avenue, Brooklyn, New York and is subject to the jurisdiction of this Court.

[70] 3. On or about October 3, 1956 plaintiff and the Union duly entered into and signed a written Amendment to a collective bargaining agreement then existing between them covering certain classifications of employees of plaintiff, to wit, the unlicensed personnel aboard the American flag ocean going dry cargo vessels operated by plaintiff. The said Amendment, among other things, extended the said collective bargaining agreement to September 30, 1958.

4. A duly signed collective bargaining agreement between the plaintiff and the Union is now, and at all times herein mentioned was, in full force and effect, a copy of which, as prepared by the Union, is hereto attached and made a part hereof and marked Exhibit A, the said collective bargaining agreement contains, among other provisions, the following:

ARTICLE II

General Rules

"Section 4. Stoppage of Work. There shall be no strikes, lockouts, or stoppages of work while the provisions of this agreement are in effect."

5. On August 19, 1957 the SS FRANCES, owned and operated by the plaintiff, arrived in the Port of New York and at about 3:00 p.m. on said date the defendant Union and the individual defendants without warning to plaintiff caused

the SS FRANCIS and the property of the plaintiff to be picketed and the vessel is now being picketed.

6. On August 20, 1957, the SS KATHRYN, owned and operated by the plaintiff, arrived in the Port of New York and immediately upon arrival the defendant Union and the individual defendants caused the said vessel to be picketed and the vessel is now being picketed.

7. The said picketing of the SS FRANCES and the SS KATHRYN, which vessels have large quantities of perishables aboard, prevented their cargoes from being unloaded and compelled plaintiff to cancel their sailings from New York of those two vessels which were due to depart on August 22 and August 23 respectively.

[71] 8. The said picketing has caused a total work stoppage and is in violation of the written collective bargaining agreement which defendant Union has with plaintiff and is not the result of a labor dispute as that term is defined by Section 876-a of the Civil Practice Act of New York.

9. Plaintiff is in full compliance with all the terms of its collective bargaining agreement with the defendant Union and plaintiff has not refused to comply with any of the terms of said agreement.

10. The action taken by defendants in causing the SS FRANCES and the SS KATHRYN to be picketed has caused and is causing plaintiff serious loss, damage and irreparable injury for which plaintiff has no adequate remedy at law, in that plaintiff has lost, and will continue to lose, the business of its regular customers who, but for the aforesaid picketing, would be engaging plaintiff's vessels for the transportation of cargoes and that, if said picketing is not immediately restrained, perishable commodities presently aboard the said vessels will be destroyed.

WHEREFORE plaintiff respectfully prays that this Court issue an appropriate Order temporarily and permanently restraining and enjoining the individual defendants and

the defendant Union and all of its officers, representatives, agents, servants, employees, attorneys and all members or persons acting on concert or participation with it, (a) from breaching or otherwise violating the present collective bargaining agreement between plaintiff and defendant Union, and (b) from engaging in or inciting any strike or work stoppage, or, by picketing or by issuing, directly or indirectly, any orders, directions, instructions, appeals or by any like or related acts or conduct or by permitting any such to remain in existence or effect, otherwise preventing or interfering in any way with the discharging, loading, moving or operating of the SS FRANCES, the SS KATHRYN or any other vessel owned or [72] operated by the plaintiff, A. H. BULL STEAMSHIP COMPANY, so long as the present collective bargaining agreement between the parties remains in effect, and for such other and further and different relief as in the premises may be deemed necessary, adequate and proper.

SATTERLEE, BROWNE & CHEIBONNIER
Attorneys for Plaintiff
Office & P. O. Address
30 Broad Street
New York 4, New York

(Verified August 22, 1957.)

[74]

EXHIBIT "A" TO EXHIBIT "B"

COPY OF FREIGHTSHIP AGREEMENT BETWEEN SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO, AND ITS CONTRACTED COMPANIES, INCLUDING A. H. BULL STEAMSHIP CO.

(Omitted; see page A 6.)

EXHIBIT "C"

[75] The New York Law Journal, Thursday, September 5, 1957, Page 9, Col. 8.

Supreme Court, Kings County, Special Term, Part I

• • •

By Mr. Justice John E. Cone

A. H. Bull Stemship Co. *v.* Hall—Plaintiff moves for an injunction pendente lite enjoining the defendants from picketing its place of business or from interfering with the discharging, loading, moving or otherwise operating its vessels. Defendants cross-move to dismiss the complaint on the grounds it fails to state facts sufficient to constitute a cause of action and that the court lacks jurisdiction of the subject matter.

The facts briefly reveal that the parties entered into an employment contract effective October 15, 1956, and expiring September 30, 1958. The contract contains a reopening and renegotiation clause relative to wages and other monetary matters. This clause in the preamble of the contract reads as follows: "Application by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deeemd cause of termination of this agreement." Article II, section 4, further provides that there shall be no strikes, lockouts or stoppages of work while the provisions of this agreement [75] are in effect. Predicated upon the reopening clause, notice was duly served upon plaintiff seeking a renegotiation of wages and other monetary matters. After a series of conferences, the parties reached a deadlock resulting in the picketing of plaintiff's place of business.

It is plaintiff's contention that the right of renegotiation and the failure to reach an amicable adjustment of

wages, &c., did not carry with it the concomitant right to strike in support thereof but rather that the defendants were relegated to section 3, Article II, of the contract relative to the arbitration of grievances arising in connection with the performance of the agreement. That inasmuch as plaintiff is seeking to enforce the provisions of the agreement between the parties, section 876-a of the Civil Practice Act is not applicable. With this contention the court does not agree. A labor dispute does not lose its characterization as such merely because it occurs in violation of an agreement and if there is a bona fide labor dispute between the parties, the plaintiff may not avoid the requirements of section 876-a merely by showing the violation of an agreement by defendants (Bert Mfg. Co. *v.* Local 810, &c., 136 Supp., 2d 805).

Section 876-a, subdivision 10-c, in defining the term "labor" dispute reads as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or [75] representation of persons in negotiating, fixing, maintaining changing or seeking to arrange terms or conditions of employment, or concerning employment relations . . ."

It is needless to say that an impasse in wage negotiations between an employer and the union bargaining in behalf of its employees constitutes a "controversy concerning terms or conditions of employment" within the meaning of the above-quoted subsection (Vim Electric Co. *v.* Solomon, 67 N. Y. S. 2d. 908). It would appear that in this state the weight of authority supports the proposition that a breach of a collective bargaining agreement constitutes a controversy concerning terms and conditions of employment and is a labor dispute within the meaning of section

Exhibit "C"

876-a (Di Deri et al. *v.* Gene Louis Inc., 261 App. Div., 920, aff'd 288 N. Y. 592 (with modifications not here material); Scafidi *v.* Debnar, 22 N. Y. S., 2d 390; Green Bus Lines, Inc., *v.* Flynn, 61 N. Y. S., 2d 663).

While the court is clearly sympathetic to those employees not parties to the dispute who are unable to earn their livelihood because of the dispute, it finds that plaintiff is not entitled to the relief sought herein since it must comply with section 876-a, subdivisions 1 and 4.

Accordingly, the motion for an injunction pendente lite is denied, without prejudice to a renewal thereof if [75] plaintiff is so advised upon the service of an amended complaint. In view of this disposition, the court grants the motion to dismiss with leave to serve an amended complaint.

A. H. Bull Steamship Co. *v.* Atkins—The motion herein is a companion to the motion by the plaintiff in its action against the Seafarers International Union of North America decided herewith. The motions seeks similar relief upon facts almost identical. The reasons set forth in the disposition of the seafarers' case are applicable herein and, accordingly, similar disposition is made herein. Settle order on notice.

EXHIBIT "D"

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON WILLIAMS being duly sworn deposes and says:

I am Vice-President in Charge of Operations of A. H. Bull & Co., Inc. I have represented our steamship lines in labor negotiations since 1936 with the exception of 4½ years spent in the service from 1941 to 1946.

Negotiations with the Seafarers' International Union of North America, which I shall hereafter refer to as SIU, and its predecessors have always been carried on by an informal negotiating group representing the majority of companies having contracts with the SIU.

Upon completion of the negotiations the contracts were signed by the individual companies and the Union.

I have been a member of the Negotiating Committee since 1946. The Negotiating Committee varied in size, increasing as the years went by and additional companies desired representation on the Negotiating Committee until it reached a point where the Committee usually consisted of five or six representatives.

As of 1946, when I took my position on the Negotiating Committee, the uniform contracts between the SIU and the Companies whose employees were representd by that Union contained the following "no strike" provision:

> "There shall be no strikes, lockouts, or stoppage of work while the provisions of this agreement are in effect."

The agreement as of that date did not provide for any reopening on monetary matters during its term, however,

Exhibit "D"

during negotiations leading up to the execution of the 1947 agreement between the SIU and the companies which it had under contract, the Union pointed out that other maritime unions representing unlicensed personnel had contracts with companies whose [77] employees were represented by those unions whose contracts expired at various dates prior to the expiration date of the SIU agreement. Due to this fact increases negotiated by these other unions, which are directly competitive with the SIU, regularly became effective prior to the increases or other contract modifications negotiated by the SIU. The SIU demanded that its standard agreement, to which plaintiff was and is a party, be amended to include a wage reopening provision which would permit it to follow whatever industry wage pattern was set by the other maritime unions in their negotiations without waiting for the expiration date of the SIU contract. This demand was agreed to by the companies under contract to the SIU and after considerable discussion the language reflecting the agreement finally reached is now contained in the preamble to the standard agreement between those companies, including the plaintiff, and the Union which is as follows:

> "Application by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement."

As one who personally participated in the said negotiations with the SIU which lead to this contract modification, which has been in each collective bargaining agreement since that date and is now in the present collective bargaining agreement, I know that the above quoted provision of the contract was dealt with and considered as applying equally to the companies as well as the Union.

Exhibit "D"

At the time the above quoted provision was negotiated the future of the American Merchant Marine seemed uncertain and the negotiators for the Union made it clear that if economic conditions turn downward and the companies requested a wage reduction which the Union would not agree to, such application by the companies to reduce wages would not nullify the "no strike-no lockout" clause. In like manner it was understood and agreed that if the companies refused a Union demand for an increase in wages or other monetary [78] matters such refusal would likewise not nullify the "no strike-no lockout" clause of the contract.

Since the companies or the Union could open negotiations for changes in the wage scale or any monetary matter at any time and as many times as they wished during the life of the agreement, the negotiators agreed that the "no strike-no lockout" clause was not to be nullified because of an application by either party and to this and it was agreed and inserted in the wage reopening clause that such applications "shall not be deemed cause for termination of this agreement". This clause was put in to prevent either the companies or the Union from taking economic action to enforce a wage change during the life of the agreement which was not voluntarily agreed to by the other side. Both the companies and the Union contracted away their right to take economic action during the life of the agreement because it was the general understanding that if there was any general changes in monetary matters in the shipping industry as a whole, and either side requested the incorporation of such change in the contract, it would be economically unwise for the companies or the Union to refuse to accept and agree to such changes because in the event of an arbitration all parties recognized that an arbitrator would unquestionably award any prior determined wage pattern in the industry.

That this is the correct interpretation of these contract clauses is evidenced by the fact that at no time since adop-

Exhibit "D"

tion of the wage reopening clause in 1947 has the Union caused a strike or work stoppage to enforce any demands made by the Union under the wage reopening clause against any of the dry cargo carriers, including plaintiff. It was not until plaintiff refused the defendants' exorbitant, unjust and discriminatory demands that the defendants for the first time claimed that a strike to enforce these demands was not a violation of the "no strike no lockout" clause. This contention by the defendants is in effect a claim that a refusal by one of the parties to meet a wage demand of the other under the reopening clause terminates the agreement.

[79] Submitted with this affidavit is a copy of the amended complaint which I have verified on behalf of the plaintiff in this action and which I incorporate by this reference in this affidavit. As will be seen from the amended complaint the individual defendants herein and the defendant Union have caused through picketing and other means stoppages of work aboard four of plaintiff's vessels presently at plaintiff's Brooklyn piers. These work stoppages clearly violate the "no strike" clause of the present collective bargaining agreement between plaintiff and defendant Union.

This unlawful strike has already caused plaintiff great and irreparable injury through the tie-up of four vessels with a consequent loss of substantial freight business to plaintiff's competitors. Unless this unlawful strike is promptly enjoined, plaintiff will continue to suffer great and irreparable injury for which no adequate legal remedy exists.

In addition to the damage caused plaintiff by virtue of the present delay in the movements of the SS FRANCES, the SS KATHRYN, the SS BEATRICE and the SS ELIZABETH plaintiff has other vessels whose operations could be affected unless defendants are enjoined.

Exhibit "D"

Plaintiff has no adequate legal remedy because the damage done to plaintiff's position in the shipping industry and to its good will amongst its customers is incalculable in monetary terms.

Plaintiff asks to proceed by an Order to Show Cause because the damage presently being suffered by the continuing acts and activities of the defendants herein necessitating a prompt hearing and disposition of its application for an injunction *pendente lite*.

Application for similar relief was made in the original complaint which was denied with leave to file an amended complaint and this amended complaint is in compliance with the Order dated September 3, 1957 of Justice John E. Cone of this Court.

[80] WHEREFORE I respectfully submit that an injunction *pendente lite* substantially in the form set forth in the Order to Show Cause submitted herewith should issue forthwith.

/s/ MILTON WILLIAMS

(Verified September 3, 1957.)

EXHIBIT "E"

Amended Complaint For Injunctive Relief

* * * *

[81] Plaintiff, A. H. Bull Steamship Company, by Satterlee, Browne & Cherbonnier, its attorneys, alleges upon information and belief as follows:

1. Plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Delaware and is engaged in and carrying on a business affecting commerce, to wit, that of a common carrier by water in foreign and intercoastal trade with its principal office at 115 Broad Street, New York, New York and within the jurisdiction of this Court.

2. The defendants Paul Hall, as Secretary-Treasurer and Claud Simmons, Edward Mooney and Joseph Algina, each as Assistant Secretary-Treasurer (hereinafter called individual defendants) are citizens of the State of New York and defendant, Seafarers' International Union of North America, AFL-CIO (hereinafter called Union) is and at all times hereinafter mentioned was and at the time of the filing of this amended complaint is a voluntary unincorporated association, to wit, a labor organization with its principal office located at 675 Fourth Avenue, Brooklyn, New York and is [82] subject to the jurisdiction of this Court.

3. On or about October 3, 1956 plaintiff and the Union duly entered into and signed a written Amendment to a collective bargaining agreement then existing between them covering certain classifications of employees of plaintiff, to wit, the unlicensed personnel aboard the American flag ocean going dry cargo vessels operated by plaintiff. The said Amendment, among other things, extended the said collective bargaining agreement to September 30, 1958.

4. A duly signed collective bargaining agreement between the plaintiff and the Union is now, and at all times herein mentioned was, in full force and effect, a copy of

which, as prepared by the Union, was attached to the original complaint and marked Exhibit A and is incorporated herein by reference and made a part hereof, the said collective bargaining agreement contains, among other provisions, the following:

ARTICLE II

General Rule

"Section 4. Stoppage of Work. There shall be no strikes, lockouts, or stoppages of work while the provisions of this agreement are in effect."

5. The said collective bargaining agreement also contains a provision as follows:

"* * * Applications by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement. Monetary matters for the purpose of this Section shall be the following: Wages, Overtime, Standby Rate, Longshore Rate, Tank Cleaning Rate, Explosives Handling Rate, Extra Meals Rate, Subsistence Rate and Room Allowance."

6. On or about June 17, 1957 plaintiff received a telegram from the Union, signed by the defendant, PAUL HALL, by which application was made to open negotiations for a revision of wages and other monetary matters in the existing collective bargaining agreement between the plaintiff and the Union. A similar telegram was sent by the Union to all other dry cargo operators on the Atlantic and Gulf Coast.

[83] 7. The said telegram sent by the Union on or about June 17, 1957 to the dry cargo vessel operators on the Atlantic and Gulf Coast having collective bargaining agree-

Exhibit "E"

nents with the Union, including the telegram sent to the plaintiff, requested a meeting "on Monday June 24 at 2 PM in the offices of the Seafarers Welfare Plan Room 1060 11 Broadway New York, New York".

8. Subsequent to the meeting on Monday, June 24, 1957, plaintiff, in accordance with its long established practice, offered to sign a wage amendment to its existing collective bargaining agreement with the Union which would grant to the unlicensed personnel serving aboard the American flag dry cargo vessels operated by the Company the same increase in wages with the same effective date as granted by other dry cargo vessel operators having collective bargaining agreements with the Union.

9. The Union by its Secretary-Treasurer, the defendant PAUL HALL, demanded of plaintiff substantially more than the wage pattern increase for dry cargo vessels operated on the Atlantic and Gulf Coast and gave as a reason for such exorbitant demands conditions over which plaintiff has no control.

10. The Union reduced its demands to writing and delivered them to plaintiff at about 4:30 P. M. on August 15, 1957, to which plaintiff immediately replied by telegram as follows:

> "IN REPLY TO YOUR COMMUNICATION DATED AUGUST 12 1957 ENTITLED SIU FINAL OFFER TO BULL LINE, WHICH WAS DELIVERED TO US BY HAND ABOUT 4:30 PM AUGUST 15, THERE IS NO JUSTIFICATION FOR YOUR DEMAND THAT BULL LINE PAY ITS UNLICENSED SEAMEN SUBSTANTIALLY MORE THAN IS PAID BY OTHER DRY CARGO OPERATORS ON THE EAST COAST STOP IN OUR NEGOTIATIONS YOU HAVE TALKED ABOUT JOB SECURITY FOR BULL LINE SEAGOING PERSONNEL STOP CERTAINLY ANYONE FAMILIAR WITH THE MARITIME INDUSTRY KNOWS THAT UNDER THE COMPETITIVE CONDITIONS IN THE INDUSTRY IT WOULD BE

Exhibit "E"

SUICIDE FOR A COMPANY AND A COMPLETE LOSS OF JOB SECURITY FOR ITS SEAMEN IF A COMPANY AGREED TO YOUR DEMANDS STOP A WORK STOPPAGE WOULD BREACH YOUR COLLECTIVE BARGAINING AGREEMENT WITH US WHICH DOES NOT EXPIRE UNTIL SEPTEMBER 30, 1958 AND WHICH WE ARE PREPARED [84] TO LIVE UP TO IN ALL RESPECTS STOP WE HAVE BEEN AND ARE PREPARED AND WILLING TO SIGN AN AGREEMENT WITH YOU GRANTING OUR SEAMEN THE SAME WAGE PATTERN INCREASE GRANTED TO THE EAST COAST DRY CARGO INDUSTRY WITH THE SAME EFFECTIVE DATE AS THAT OF OTHER SIU DRY CARGO OPERATORS STOP * * *"

11. Plaintiff received no reply to its aforesaid telegram of August 15, 1957 but, after the SS FRANCES, owned and operated by plaintiff, arrived in the port of New York and at about 3:00 PM on August 19, 1957 the defendant Union and the individual defendants, without warning to plaintiff, caused the SS FRANCES and the property of the plaintiff to be picketed and the vessel is now being picketed and the plaintiff is unable to discharge the SS FRANCES.

12. Thereafter, and on or about August 20, 1957, the SS KATHRYN, owned and operated by plaintiff, arrived in the port of New York and the defendant Union and the individual defendants caused the said vessel to be picketed and the vessel is now being picketed and plaintiff is unable to discharge the said SS KATHRYN.

13. Thereafter, the SS BEATRICE and the SS ELIZABETH, owned and operated by plaintiff arrived respectively in plaintiff's terminal in Brooklyn, New York on August 26, 1957 and August 27, 1957, and upon arrival the defendant Union and the individual defendants caused the said vessels to be picketed and the vessels are now being picketed.

14. The said picketing of the SS FRANCES and the SS KATHRYN, which vessels have large quantities of perishables

aboard, prevented their cargoes from being unloaded and compelled plaintiff to cancel their sailings from New York of those two vessels which were due to depart on August 22 and August 23 respectively.

15. The said picketing of the SS BEATRICE and the SS ELIZABETH has compelled plaintiff to cancel their sailings from New York, causing plaintiff undue hardship and irreparable loss and damages.

16. The said picketing is not the result of a labor dispute as that term is defined in the Labor Management Relations Act of 1947, as Amended, [85] but is in violation of a valid collective bargaining agreement existing between the plaintiff and the defendant Union.

17. The said picketing is a strike or stoppage of work and is in violation of the written collective bargaining agreement which defendant Union has with plaintiff and is not the result of a labor dispute as that term is defined by Section 876-a of the Civil Practice Act of the State of New York.

18. Plaintiff is in full compliance with all the terms of its collective bargaining agreement with the defendant Union and plaintiff has not refused to comply with any of the terms of said agreement.

19. The defendants have no legal right to cause stoppages of work by picketing plaintiff's property or its vessels in violation of Article II, Section 4, of the valid existing collective bargaining agreement between plaintiff and defendant Union.

20. The action taken by defendants in causing the property and vessels of the plaintiff to be picketed has caused and is causing plaintiff serious loss, damage and irreparable injury, for which plaintiff has no adequate remedy at law in that plaintiff has lost and will continue to lose the business

of its regular customers who, but for the aforesaid picketing, would be engaging plaintiff's vessels for the transportation of cargoes and that if said picketing is not immediately restrained perishable commodities presently aboard the SS FRANCES and the SS KATHRYN will be destroyed.

21. Delay in granting the coercive relief herein prayed for would result:

(a) In the continued and continuing repetition of the unlawful act of picketing with no proper justification.

(b) In the continued and continuing irreparable loss and damage to plaintiff as well as to its tangible and intangible property.

[86] (c) In the continued and continuing repetition of the unlawful acts herein described against which plaintiff has no adequate remedy at law.

(d) In greater injury to plaintiff than will be inflicted upon defendants by the granting of relief sought.

(e) In the continued and continuing irreparable loss and damage to plaintiff as well as to its tangible and intangible property against the loss and damage to which the public officials charged with the duty to protect plaintiff's property would be unable to furnish adequate protection in that the acts of defendants have not been riotous, disorderly or outwardly destructive.

WHEREFORE, plaintiff respectfully prays that this Court issue an appropriate Order temporarily and permanently restraining and enjoining the individual defendants and the defendant Union and all of its officers, representatives, agents, servants, employees, attorneys and all members or

persons acting in concert or participation with it, (a) from breaching or otherwise violating the present collective bargaining agreement between plaintiff and defendant Union, and (b) from engaging in or inciting any strike or work stoppage, or by picketing or by issuing, directly or indirectly, any orders, directions, instructions, appeals or by any like or related acts or conduct or by permitting any such to remain in existence or effect, otherwise preventing or interfering in any way with the discharging, loading, moving or operating of the SS FRANCES, the SS KATHRYN, the SS BEATRICE, the SS ELIZABETH or any other vessel owned or operated by the plaintiff, A. H. BULL STEAMSHIP COMPANY, so long as the present collective bargaining agreement between the [87] parties remains in effect, and for such other and further and different relief as in the premises may be deemed necessary, adequate and proper.

SATTERLEE, BROWNE & CHERBONNIER
Attorneys for Plaintiff
Office and P. O. Address
30 Broad Street
New York 4, New York

(Verified September 4, 1957.)

[90] **Memorandum Opinion**

(Special Term, Part I) By Brown, J.

Dated September 19, 1957

SUPREME COURT

KINGS COUNTY

A. H. BULL STEAMSHIP COMPANY,

vs.

THOMAS ATKINS as President of the INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS, INC. et al, etc.

Plaintiff moves for an injunction *pendente lite* in an action arising out of the breach of a collective bargaining agreement.

Defendants cross-move to dismiss the amended complaint upon the ground of insufficiency and upon the further ground that the complaint fails to comply with the requirements of Section 876a of the Civil Practice Act.

This court has already determined that this case is a "labor dispute" as that term is defined in said section (Decision of Cone, J., NYLJ 9/5/57, p. 9, col. 8). By the same decision the original complaint was dismissed with leave to amend on the ground that the requirements of subdivisions 1 and 4 of Section 876a had not been complied with.

The allegations of the amended complaint now meet the requirements of that section (*Carroll Towing Co.* v. *Bradley*, 91 N. Y. S. [2] 431 [not otherwise reported], affd. 275 App. Div. 1022). Accordingly, the cross-motion to dismiss the amended complaint is denied.

The hearing required by Section 876a shall be held before Official Referee John MacCrate.

Settle order on notice.

[91]

Memorandum Opinion

(Special Term, Part I) By Brown, J.

Dated September 19, 1957

SUPREME COURT

KINGS COUNTY

A. H. BULL STEAMSHIP COMPANY

vs.

PAUL HALL, as Secretary-Treasurer, and CLAUD SIMMONS, EDWARD MOONEY and JOSEPH ALGINA, each as Assistant Secretary-Treasurer of the SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO, et ano.

The motions herein are companion to the motions made in the action by the same plaintiff against Atkins et al., decided herewith. With the exception, in the cross-motion to dismiss, of the additional factor relating to lack of jurisdiction, these motions seek similar relief.

The original complaint herein was dismissed on the same grounds as in the Atkins case (see decision Cone, J., N. Y. L. J. 9/5/57, p. 9, col. 8). Here too the allegations of the amended pleading now meet the requirements of section 876-a of the Civil Practice Act. While counsel for the defendants contends that this court is pre-empted and ousted of jurisdiction by reason of the National Labor Relations Act, the complaint on its face does not charge the defendants with any unfair labor practice as to bring

into action the provisions of the Act, which empower the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice * * * [defined by the Act] affecting commerce." (*Guss* v. *Utah L. R. B.*, 353 U. S. , 1 L. Ed. 2d 601, § 160, National Labor Relations Act.) While it may be that on the hearing and trial the parties by proof may establish that the provisions of the National Labor Relations Act are applicable, on the complaint herein, which is the only matter to be considered on a motion of this character, the cross-motion to dismiss must be denied.

[92] As the court held in dismissing the original complaint "a breach of a collective bargaining agreement constitutes a controversy concerning terms and conditions of employment and is a labor dispute within the meaning of Section 876-a of the Civil Practice Act." (See cases cited therein.)

Accordingly, this motion is set down for a hearing as provided for in the companion motion. Submit order on notice.

Opinion Below

[102]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

A. H. Bull Steamship Co.,
Plaintiff,

against

Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO,
Defendant.

Civil No. 18007

September 27, 1957

Appearances:

Satterlee, Browne & Cherbonnier
and
Donovan, Leisure, Newton & Irvine
Attorneys for Plaintiff

James V. Hayes
A. V. Cherbonnier
Sidney P. Howell, Jr.
Helmut J. F. Furth
Of Counsel

Seymour W. Miller,
Attorney for Defendant

Bruchhausen, D. J.

The plaintiff, an operator of ships engaged in the transportation business, instituted this action against the defendant, Labor Union, for specific performance of a col-

lective bargaining agreement, entered into between the parties and [103] for other relief. The subject motion is for provisional remedies, enforcing the agreement, pendente lite.

The facts, not in dispute, in substance, are as follows:

1. That the parties entered into a collective bargaining agreement in October 1956, which will not expire by its terms until September 30, 1958.

2. That the agreement and predecessor agreements contain a provision that there shall be no strikes, lockouts or stoppages of work while the provisions of the agreement are in effect.

3. That the defendant shall furnish to the plaintiff capable and competent personnel in ample time to prevent any delay in the scheduled departure of its vessels.

4. That on August 19, 1957, the defendant called a strike against the plaintiff and that the strike has been in existence ever since.

On June 17, 1957, the defendant served upon the plaintiff a notice to open negotiations for a revision of wages and other monetary matters and negotiations were had, which were unsuccessful.

The plaintiff contends that the defendant entered into the negotiations in bad faith and that its motive was to use them to further its attack on American Coal Shipping Inc., which has taken over stock control of the plaintiff. That [104] claim has no particular relevance at his time.

The said collective bargaining agreement fails to clothe the defendant with the right to strike or to breach the agreement for any of the reasons advanced by the plaintiff. The only reference therein to the opening of negotiations for changes in the agreement is that they may be discussed but no right was thereby conferred upon either

party to terminate the agreement on that account. The provision so referred to is that "applications by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement."

The work stoppages have caused and are causing serious loss, damage and irreparable injury to the plaintiff for which it has no adequate legal remedy.

The principal question herein pertains to the interpretation of certain provisions of the 1932 Norris-LaGuardia Act and of the later act, the Labor Management Relations Act of 1947. The Norris-LaGuardia Act of 1932 (29 U. S. C. 101 et sequa), particularly Section 104 thereof, sets forth in substance that no federal court shall issue any order restraining a person or persons, involved in a labor dispute, from ceasing or refusing to perform any work, whereas Section 301 of the Labor Management Relations Act of 1947 (29 U. S. C. [105] 185) conferred jurisdiction upon the federal courts in suits for violation of contracts between an employer and a labor organization engaged in interstate commerce, regardless of the amount in controversy or the citizenship of the parties.

It will be recalled that in 1932, during the depth of the economic depression, collective bargaining in the labor field was practically non-existent. The legislative policy, proclaimed in Section 102 of the 1932 Norris-LaGuardia Act was that workers should be unhampered in organizing. It was stated therein that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."

The said 1932 Act was aimed at correcting "existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either

of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction." *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad Co.*, 353 U. S. 30, 40.

The aforementioned Section 104 of the Norris-LaGuardia Act thus removed jurisdiction that the federal courts possessed, though by circuitous route. Employers, hampered by local law, would work their way into federal courts, before [106] the decision in *Erie Railroad* v. *Thompkins*, 304 U. S. 64, and obtain favorable jurisdiction in Labor disputes, resulting in strike injunctions.

Section 301 of the Labor Management Relations Act of 1947 vested federal courts with jurisdiction to impose certain responsibility upon labor unions which had not theretofore prevailed. The significant element of Section 301 of the said Act was not that unions had the right to resort to the federal courts, since they could always have done so, if the other jurisdictional requirements were met, just as employers were entitled to do, within the limitations of the 1932 Act, but that in cases involving labor contracts, the federal courts by Section 301 were accorded complete jurisdiction, regardless of the amount involved, or of other jurisdictional requirements, and that in order to make labor unions amenable to such jurisdiction, they could be sued as an entity and money judgments could be enforced against their assets, though not against the assets of the individual members.

The 1932 Norris-LaGuardia Act circumscribed federal jurisdiction, only after other jurisdictional requirements, such as diversity, or amount involved etc., were met. On the other hand, the Labor Management Relations Act of 1947 conferred such jurisdiction.

In situations not involving labor contracts, such as [107] collective bargaining agreements, employers are governed by local laws as well as by the Norris-LaGuardia Act. How-

ever, by the enactment of the Labor Management Relations Act of 1947 and particularly Section 301 the Congress extended the jurisdiction of the federal courts, without reservation, to labor contract disputes whereas in the earlier 1932 Act, it limited such jurisdiction, as stated in Section 104, despite compliance with the other jurisdictional requirements. The said Section 104 constituted a complete restriction, not only as to labor contract controversies but also as to numerous other labor suits instituted in the federal courts.

In the interest of industrial peace, the federal courts under the 1947 Act were given jurisdiction of labor contracts without reservation or denial of any of their other inherent or traditional powers, legal or equitable. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448.

Labor was not thereby stripped of its primary weapon without the substitution of any reasonable alternative. *Brotherhood of Railroad Trainmen et al.* v. *Chicago River & Indiana R.R. Co., supra.*

That the primary objective of the 1932 Norris-LaGuardia Act was to aid workers in their efforts to organize and enter into collective bargaining agreements, rather than the consideration of the rights and remedies of the parties [108] thereunder, subsequent to the execution of such agreement, is emphasized in the latter mentioned case, wherein the Court said:

> "The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining."

A principal purpose of the more recent Act, the Labor Management Relations Act, 1947, not contemplated by the Norris-LaGuardia Act, was the enforcement of collective

bargaining agreements. It provides that "suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States * * *." (Section 301(a)).

In the recent case of *Textile Workers of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448 (decided June 3, 1957), the plaintiff Union invoked the jurisdiction of the federal court under said Section 301 (also referred to as 29 U. S. C. 185) to compel the defendant, the employer, to submit to arbitration, as provided for by the terms of the collective bargaining agreement, entered into between the parties. The agreement also contained a no-strike clause, similar to the one in the case at bar. The Court, in its opinion, quoted from the Senate and House Reports, which preceded the enactment of the statute. It appears in both reports that the primary concern was that [109] unions and employers should both be bound to collective bargaining contracts and be governed by "the usual processes of the law."

The intent and purpose of the proposed legislation, reported by the Senate, quoted in the opinion in the *Textile Workers* case, in substance, is as follows:

1. That the chief advantage which an employer can reasonably expect from a collective labor agreement is the assurance of uninterrupted operation during the term of the agreement.

2. That without some effective method of assuring freedom from economic warfare for the term of the agreement there is little reason why an employer would desire to sign such a contract.

3. That to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the federal courts.

4. That Section 185 in the proposed law provides for suits by and against unions as legal entities.

Opinion Below

It will be noted that the Senate Committee, so reporting, did not limit faithful performance to any particular breach or to any particular party, committing the breach. It clearly meant to insure faithful performance of the entire agreement to the end that there should be industrial peace. [110] There could be no such assurance if either party, at will, might breach the contract by refusal to perform, and there be no adequate enforcement procedure. Non performance, without the remedy of enforcement, would completely set at nought the object of the statute, as so stated, and render the legislation practically impotent.

The Court in the *Lincoln Mills* case, *supra,* in analysis of the said House and Senate Reports, wrote:

> "Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' Id., p. 15. As stated in the House Report, supra, p. 6, the new provision 'makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts.' To repeat, the Senate Report, supra, p. 17, summed up the philosophy of Section 301 as follows: 'Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.'"

In the *Lincoln Mills* case, *supra,* the Court further said:

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce [111] these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way. * * *

Opinion Below

"Though a literal reading (of provisions of the Norris-LaGuardia Act) might bring the dispute within the terms of the Act (see Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 602-604) we see no justification in policy for restricting Section 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act. Moreover, we held in Virginian R. Co. *v.* System Federation, 300 U. S. 515, and in Graham *v.* Brotherhood of Firemen, 338 U. S. 232, 237, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act. The mandates there involved concerned racial discrimination. Yet those decisions were not based on any peculiarities of the Railway Labor Act. We followed the same course in Syres *v.* Oil Workers International Union, 350 U. S. 892, which was governed by the National Labor Relations Act. There an injunction was sought against racial discrimination in application of a collective bargaining agreement; and we allowed the injunction to issue. The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of Section 7 of the Norris-LaGuardia Act."

It is plain that the statute empowers this Court to invoke the remedy of specific performance, also that the undisputed facts presented warrant such procedure. That remedy [112] embraces affirmative as well as negative acts. *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 2 Cir., 126 F. 2d 978.

The plaintiff's motion is granted. The defendant's cross motion is denied. Settle order on two days' notice at which time the parties may submit their proposals as to security and preference of the trial.

/s/ WALTER BRUCHHAUSEN
U. S. D. J.

Counter-Order as Submitted by Defendant Below

• • •

[116] Plaintiff, having moved herein for a preliminary injunction, and defendant, having cross-moved for an order 1) dismissing the complaint, or, in the alternative 2) dismissing the complaint, pro tanto, insofar as it seeks an injunction and declaratory judgment, as well as a stay on the ground of another action pending at the time between the parties in the Supreme Court of the State of New York, in and for the County of Kings, wherein the same injunctive relief is sought as is sought herein, or in the alternative 3) that all further proceedings in this Court be stayed upon the grounds of the pendency of the aforesaid State Court action, and the Court having considered the complaint herein, dated September 16, 1957, and the affidavit of Milton Williams, sworn to September 16, 1957, in support of the motion for a preliminary injunction, the affidavits of Paul Hall, Claude Simmons, and Seymour W. Miller, together with the Exhibits annexed thereto, all sworn to September 18, 1957, in opposition to the said motion and in support of the said cross-motion, and after hearing Donovan, Leisure, Newton & Irvine, Esqs., and Satterlee, Browne & Cherbonnier, Esqs., by James V. Hayes, Esq., of counsel, in support of the said motion and in opposition to the said cross-motion, and Seymour W. Miller, Esq., in opposition to the said motion and in support of the said cross-motion, and the Court having received and considered the briefs of counsel and after due deliberation, the Court having filed its opinion [117] herein, on September 27, 1957, and plaintiff having filed, and the Court having approved, the undertaking prescribed by Rule 65(c) of the Federal Rules of Civil Procedure, it is, therefore,

ORDERED that, effective October 1, 1957, at o'clock, Eastern Daylight Saving Time, defendant Seafarers' International Union of North America, Atlantic and Gulf

Counter-Order as Submitted by Defendant Below

District, AFL-CIO, its officers, agents, servants, employees and attorneys, and those persons in active concert or participating with them who receive actual notice of this order, be and the same hereby are, restrained, during the pendency of this action, from picketing, striking, or otherwise causing any work stoppage aboard any of the vessels owned or operated by plaintiff, wherever such vessels may be, and it is,

FURTHER ORDERED that the defendant's cross-motion be and the same hereby is in all respects denied, and it is

FURTHER ORDERED that this case be set down for trial at such time as the Court may direct upon three days notice of motion made subsequent to the filing, as provided by law, of the answer herein.

Dated: Brooklyn, New York, September , 1957.

Enter

.....

U. S. D. J.

Order Granting Preliminary Injunction Appealed From

* * *

[119] Plaintiff having moved herein for an order enjoining defendant, Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, *pendente lite* and said defendant having cross moved herein and these causes having come before the Court on September 18, 1957, and the Court having heard argument by James V. Hayes, Esq., counsel for plaintiff, and Seymour W. Miller, Esq., counsel for defendant, and received and considered the affidavits and briefs filed on behalf of the respective parties, and, after due deliberation, it appearing that the Court has jurisdiction of this action under Section 301 of the Labor Management Relations Act of 1947 (29 U. S. C., Section 185), that there is presently in existence a collective bargaining agreement between the parties hereto, which agreement, by its terms, will not expire until September 30, 1958, and that defendant has violated and is presently violating the provisions of said collective bargaining agreement, to wit, Article I, Section 2, and Article II, Section 4 thereof, and it further appearing that, if defendant not be restrained preliminarily, plaintiff will suffer irreparable injury for which it has no adequate legal remedy, the Court having, on September 27, 1957, filed its opinion thereon, and [120] plaintiff having filed, and the Court having approved, the undertaking as prescribed by Rule 65(c) of the Federal Rules of Civil Procedure, it is, therefore,

ORDERED that, effective on October 1, 1957, at 5 P. M., Eastern Daylight Savings Time, defendant, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, Atlantic and Gulf District, AFL-CIO, its officers, agents, members, servants, employees, attorneys, and all persons in active concert or participation with them, who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking, or inciting, causing, inducing, or, in

any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. B. BULL STEAMSHIP Co., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is

FURTHER ORDERED that the said defendant specifically perform its agreement to furnish the plaintiff with capable, competent, and physically fit persons when and where they are required, and of the ratings needed to fill vacancies necessitating the employment of Unlicensed Personnel, in ample time to prevent any delay in the scheduled departure of any vessel covered by said agreement, and it is

FURTHER ORDERED that defendant's cross-motion be and the same is hereby in all respects denied, and it is

[121] FURTHER ORDERED that the Court's opinion filed herein on September 27, 1957, shall constitute the findings of fact and conclusions of law as required by Rule 52(a) of the Rules of Civil Procedure.

Dated: Brooklyn, New York, September 30th, 1957.

Enter

s/ WALTER BRUCHHAUSEN
United States District Judge

Stipulation

* * * *

[124] WHEREAS, this Court has on September 30, 1957, issued a Preliminary Injunction against the defendant herein, it is, therefore, subject to the approval of this Court,

STIPULATED AND AGREED that this case shall be set down for trial at such time as the Court may direct upon motion by either party hereto made upon three days' notice at any time subsequent to the filing, as provided by law, of defendant's answer herein.

Dated: Brooklyn, New York,
September 30, 1957.

SATTERLEE BROWNE & CHERBONNIER
DONOVAN, LEISURE, NEWTON & IRVINE

By JAMES V. HAYES

.....
Attorneys for Plaintiff

By SEYMOUR W. MILLER

.....
Attorney for Defendant

SO ORDERED:

WALTER BRUCHHAUSEN
U. S. D. J.

Notice of Appeal

* * *

[125] SIRS:

PLEASE TAKE NOTICE that defendant Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, hereby appeals from the order herein dated September 30, 1957, granting a temporary injunction and from each and every part thereof and from the opinion of the Court herein dated September 27, 1957 upon which the aforesaid order was based, and each and every part thereof.

Dated: Brooklyn, New York
September 30, 1957.

Yours, etc.

SEYMOUR W. MILLER
Attorney for Defendant
Office & P. O. Address
26 Court Street
Brooklyn 1, New York

To:

Clerk of the United States District
Court for the Eastern District of New York

Donovan, Leisure, Newton & Irvine, Esqs.
2 Wall Street
New York, N. Y.

and

Satterlee, Browne & Cherbonnier, Esqs.
30 Broad Street
New York, N. Y.
Attorneys for Plaintiff

Office - Supreme Court, U.S.
FILED
DEC 14 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 665

A. H. BULL STEAMSHIP CO.,

Petitioner,

against

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO; and INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INC. AFL-CIO,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES V. HAYES,
Counsel for Petitioner
A. H. Bull Steamship Co.,
2 Wall Street,
New York 5, N. Y.

THEODORE S. HOPE
SIDNEY P. HOWELL, JR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ----

A. H. BULL STEAMSHIP CO.,
Petitioner,
against
SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO; and INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INC., AFL-CIO,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

A. H. Bull Steamship Co. ("Bull" herein) petitions for writs of certiorari to review two judgments of the United States Court of Appeals for the Second Circuit filed November 21, 1957 (R. A 85; 142a).[1]

Opinions Below

Separate suits were instituted by Bull as plaintiff in the District Court for the Eastern District of New York. The

[1] The mandates of the Court of Appeals were stayed pending final disposition of this petition by this Court's order (per Mr. Justice Harlan) of December 5, 1957.

first case in point of time was brought against respondent Seafarers' International Union ("SIU" herein) and is referred to as the "SIU case." Thereafter, a second action was commenced against respondents National Marine Engineers' Beneficial Association and International Organization of Masters, Mates & Pilots, Inc. ("MEBA" and "MMP" respectively) which is referred to herein as the "officers' case."

None of the opinions below has as yet been officially reported. The opinion of the District Court of September 27, 1957, in the SIU case is printed at pages A 59 A 68 of the Joint Appendix below and in Appendix A, *infra*, pages 21-28. That Court's opinion of October 17, 1957, in the officers' case is printed at pages 112a-120a of the Appendix below and in Appendix A, *infra*, pages 29-36.[2]

The opinions of the Court of Appeals of November 21, 1957, in both cases and its *per curiam* opinion of November 27, 1957, are printed in Appendix A, *infra*, pages 37-48, 49-60 and 61, respectively.

Jurisdiction

The judgments of the Court of Appeals were entered November 21, 1957. Rehearing was not requested of that Court.

Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). A single petition for certiorari to review both cases is authorized by Rule 23(5) of this Court and deemed here appropriate in view of the questions common to both cases.

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[2] The Appendices used below comprise virtually the entire record in each case before the District Court. Page references to the gray-covered Joint Appendix filed in the SIU appeal are preceded with an upper case "A". Page references to the blue-covered Appendix filed in the appeal of the officers' case below are followed with a lower case "a".

Questions Presented

A. In Both Cases:

1. Do District Courts, in suits under Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, lack jurisdiction because of the Norris-LaGuardia Act to restrain a labor organization from (a) violating the "no-strike" clause of a valid and existing collective bargaining agreement, and (b) refusing to perform its affirmative undertakings in said agreement such as the undertakings here to supply sea-going personnel on call?

B. In the Officers' Case:

2. Can suits for violations of collective bargaining agreements made on behalf of supervisory employees be brought under Section 301 of the Labor Management Relations Act?

3. In view of the withdrawal of collective bargaining rights from "supervisors" by the Labor Management Relations Act, are federal courts precluded by § 4 of the Norris-LaGuardia Act from enforcing by injunction no-strike clauses and undertakings to furnish personnel contained in agreements between employers and unions representing supervisors?

C. As to MEBA:

4. Is the doctrine of "pendent jurisdiction" applicable in advance of trial and without the taking of evidence upon an application for provisional relief where the federal claim upon which jurisdiction is based raises a substantial question of law?

Statutes Involved

The statutes involved are Sections 1(b), 301 and 501(3) of the Labor Management Relations Act of 1947, 29 U. S. C. §§ 141(b), 142(3) and 185; Sections 1, 2(3), 2(5), 2(7),

2(11) and 14 of the National Labor Relations Act, as amended, 29 U. S. C. §§ 151; 152(3), (5), (7), (11) and 164; and Sections 1, 2, 4, 7 and 13 of the Norris-LaGuardia Act, 29 U. S. C. §§ 101, 102, 104, 107, and 113. These statutes are printed in Appendix B, *infra*, pp. 62-70.

Statement of Case and Disposition Below

Petitioner Bull, a Delaware corporation, owns and operates a fleet of American-flag, ocean-going, dry cargo vessels in intercoastal and foreign commerce. Of particular moment in the controversy at bar is its regular general cargo service between the Commonwealth of Puerto Rico and various East Coast ports, primarily New York, Philadelphia and Baltimore.

Respondent SIU is an unincorporated labor organization which acts as collective bargaining representative for the unlicensed merchant seamen employed aboard Bull's vessels. Respondents MEBA and MMP similarly represent Bull's licensed engineering and deck officers respectively. Unidentified members of MEBA, an unincorporated association, are alleged to reside in Delaware (34a). MMP, on the other hand, is a non-profit membership corporation organized under the laws of New York (110a-111a).

For many years, relations between Bull and each of the respondents have been governed by formal collective bargaining agreements which, in the case of SIU, have since 1940 included a specific, unqualified and unconditional "no-strike" clause (A 9). Similar no-strike clauses are contained in the officers' contracts (11a-12a). The current SIU agreement, executed in October of 1956, will not expire, by its terms, until September 30, 1958; the MEBA agreement expires June 15, 1958, and that of MMP on September 30, 1958.[3]

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[3] Copies of these extensive agreements (not printed in the Appendices) were handed up in the court below and have been separately certified to this Court as exhibits to the record. The relevant provisions of all three agreements appear, *passim*, in the affidavits of record and are collected in Appendix C, *infra*, pp. 71-76.

Thus, Article II, Section 4, of the SIU agreement flatly declares: "There shall be no strikes, lockouts or stoppages of work while the provisions of this agreement are in effect." Similar provisions appear in the officers' contracts. In addition, each respondent is affirmatively obligated to furnish Bull with qualified personnel as and when required. Finally, each agreement permits either party thereto to reopen for changes in the wage scale and other monetary matters at times prior to termination.[4]

In the spring of 1957, the three respondent unions served upon all shipping companies which they have under contract notices of their intent to reopen for wage negotiations (A 12; 12a). Ensuing negotiations resulted generally in MEBA and MMP securing a 6% wage increase for their members, this increase being equivalent to the increase simultaneously secured by the National Maritime Union, SIU's principal competitor, on behalf of all NMU seamen. At every stage, Bull declared its willingness to pay its seagoing employees precisely the same increased wages gained by other maritime unions for their members and by MEBA and MMP with every other shipping company under contract and now constituting the industry patterns. None of the respondents, however, would agree to accept this new industry pattern from Bull and refused all offers by Bull to arbitrate or mediate any genuine wage dispute (A 10-A 13; 12a-14a). SIU admitted below that its strike was, at least in part, another battle in its labor war against one of the stockholders of Bull's parent company, SIU's "avowed labor enemy" (A 25-A 26). That similar considerations have prompted the officers is apparent (13a-14a; 38a).

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[4] As found by the District Court (A 61), SIU's right to open negotiations for changes in the wage scale or any monetary matters could not serve to terminate either the agreement itself or the no-strike covenant thereof inasmuch as the agreement's preamble provides that "[a]pplications by either party to open negotiations for changes in the wage scale . . . shall not be deemed cause for termination of this agreement." In the officers' case, it was found that in neither agreement was the no-strike clause qualified by the wage reopener (114a).

On August 19, 1957, SIU called a strike against Bull at its Brooklyn Terminal and, on September 11th, extended the strike to Puerto Rico completely tying up Bull's Puerto Rican service. MEBA and MMP also struck at those ports and later refused to clear personnel at other locations thereby effectively paralyzing virtually all of Bull's operations (15a-16a). As found by the District Court (A 61; 114a), respondents' strike activities caused Bull irreparable injury for which it had no adequate legal remedy.

Bull, on September 16, 1957, instituted suit against SIU in the District Court under Section 301 of the Labor Management Relations Act for declarative, injunctive and damage relief (A 2-A 5), and, on the authority of *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957), *Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957), and other recent decisions of this Court, moved for an injunction *pendente lite*.

Upon the facts stated above, the District Court (per Bruchhausen, D. J.), ruling that SIU had in fact breached its agreement (A 60-A 61), entered an order upon Bull's motion which, effective October 1, 1957, (a) enjoined further picketing or strike activities by SIU and all persons in active concert or participation with it, and (b) specifically ordered SIU to comply with its contractual obligation to furnish seamen as Bull might require (A 69).

While the order was ostensibly effective October 1st, SIU on that date merely removed its pickets. It furnished no seamen (R. A 95-A 96). Picketing by the two officer unions continued at Brooklyn and was instituted at Puerto Rico necessitating a second suit (2a-8a; 15a) and, again upon finding contract violations, the District Court issued a similar injunction October 21, 1957, against the officer unions (121a-122a). With the entry of this second order, all unions, including SIU, began supplying men and Bull's service as a common carrier resumed.

The two actions proceed from the same overall controversy and present substantially similar facts which are not at this stage in dispute. In both actions, federal jurisdic-

tion is invoked under the Labor Management Relations Act, Sec. 301(a). In the officers' case diversity jurisdiction is alternatively pleaded (2a-3a). Diversity is now conceded as to MMP but disputed as to MEBA (115a).

The District Court dealt with the strikes called by these unions for what they plainly were: deliberate, wilful, violations of valid existing collective bargaining agreements. This holding of the District Court was not upset by the Court of Appeals which did not reach the question of breach of contract.

The District Court reviewed and accepted the responsibilities imposed upon it by Congress with the enactment of Section 301 and recognized by this Court last June in *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U. S. 448. Cf. *Allen Bradley Co.* v. *Local No. 3,* 325 U. S. 797, 806 (1945). These responsibilities, in its view, entailed the reconciliation—or, in the language of this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R.,* 353 U. S. 30, 40 (1957), the "accommodation"—of the policies underlying Section 301 and those of the Norris-LaGuardia Act. Reviewing the legislative history, it found the primary objective of Norris-LaGuardia was to assist workers to organize and achieve parity at the bargaining table—see 29 U. S. C. § 102—and that the avowed aim of Congress in adopting Section 301 fifteen years later, was to promote industrial peace by the mutual enforceability of labor contracts.[5] The District Court concluded that this purpose of Section 301 could not be accomplished without the grant of injunctive relief where legal remedies are not adequate.

The Court of Appeals reversed, posing "the real issue" as "whether or not there had been a repeal by implication of the Norris-LaGuardia Act." Without considering the declared policy of that Act (29 U. S. C. § 102), it held the literal requirements of that Act (*Id.,* § 104, 107) to be

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[5] 61 Stat. 136; 29 U. S. C. § 141(b). See, e. g., Sen. Rep. No. 105, 80th Cong., 1st Sess., pp. 15-18; H. R. Cong. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

paramount to all other considerations of national labor policy and to deny the District Court power to restrain strike activities in "labor disputes" (*Id.*, § 113) irrespective of whether such strike activities violated a collective bargaining agreement. Conceding that this Court's decision in *Lincoln Mills, supra,* "does clearly hold that . . . [Sec. 301] . . . gives substantive rights grounded in a body of federal law which in a proper case may be enforced by equitable relief," the Court of Appeals found *Lincoln Mills* (and, accordingly, also the Railway Labor Act cases which preceded that decision and are cited at p. 458 thereof) to be completely inapplicable to the present situation. Hence it held these cases to be governed by its earlier decision in *Alcoa S. S. Co.* v. *McMahon,* 173 F. 2d 567 (1954) cert. den. 338 U. S. 821, and the First Circuit's decision in *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters,* 217 F. 2d 6 (1954) and its later dictum in *Local 205, etc.* v. *General Electric Co.,* 233 F. 2d 85, aff'd *sub nom General Electric* v. *Local 205,* 353 U. S. 547.[6]

In achieving this result, the Court of Appeals specifically rejected all recourse to "judicial legislation or inventiveness." Thus, it turned its back, so to speak, on the pattern established by this Court in the Railway Labor Act cases and its concrete direction in *Lincoln Mills* to "fashion" a body of federal law "from the policy of our national labor laws" which, in turn, was coupled with an express invitation to the federal courts to employ "judicial inventiveness" tailored to the nature of the problem. 353 U. S. at pages 456-7. No such approach is anywhere evident in the Court of Appeals disposition of the principal problem in both these cases. It is this problem which is the substance of the first Question Presented, *supra,* p. 3.

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[6] However, the Court of Appeals did not discuss the rationale of this Court's affirmance of *Local 205* (decided with *Lincoln Mills*). It is submitted that Judge Magruder's reasoning was not accepted in its entirety since this Court found it necessary to "follow in part a different path" indicating that the "different path" had been charted for federal courts generally in *Lincoln Mills.* See 353 U. S. at p. 548.

The second and third Questions Presented, *supra*, p. 3, grow out of the contentions by both unions in the officers' case that, since their members employed by Bull are "supervisors," they are not "labor organizations" subject to Section 301 but are, nevertheless, entitled to the protection of the Norris-LaGuardia Act.

The District Court found it unnecessary to resolve the first of these two questions, holding that if Section 301 applied the case was governed by its previous decision in the SIU case and that if these unions were supervisory unions they were denied the protection of Section 4 of the Norris-LaGuardia Act by Section 14 of the National Labor Relations Act, as amended, (29 U. S. C. § 164).

The Court of Appeals, answering Question 2, held that Section 301 is not applicable to collective bargaining agreements executed on behalf of a unit of supervisors. While holding that "the whole thrust of the supervisor provisions" in the 1947 amendment to the National Labor Relations Act was "to remove supervisors from the operation" of that Act, the Court of Appeals nevertheless held that such supervisors are employees so far as Norris-LaGuardia is concerned and, accordingly, their strike activities are protected by that Act.

The fourth Question Presented, *supra*, p. 3, arises out of MEBA's contention that there was a lack of diversity as to it in that certain of its members were resident in Delaware, the state of Bull's incorporation. The District Court did not pass upon this question of fact but held that the substantial federal claim asserted by Bull under Section 301 gave it "pendent jurisdiction" over Bull's entire cause of action under *Hurn* v. *Oursler*, 289 U. S. 238. Again following *Lincoln Mills, supra*, it issued a preliminary injunction.

While conceding the existence of a question of fact as to the supervisory status of MEBA members, the Court of Appeals held that the doctrine of pendent jurisdiction is a mere rule of judicial economy and not applicable in advance of trial on a motion for provisional relief.

It is submitted that the above rulings of the Court of Appeals have brought its decisions into conflict with decisions of other federal courts. See, *infra*, pp. 12-17.

These considerations, we further submit, persuasively demonstrate not only "the importance of the questions raised in this appeal" but "also that the questions are not free from doubt." See the *per curiam* opinion of the Court of Appeals, Appendix A, *infra*, p. 61.

Reasons for Granting the Writs

A.

These cases present questions which are of vital importance to the administration of our national labor laws. Congress, in enacting § 301, has declared that the execution of a collective bargaining agreement shall be a meaningful act. This Court, in *Lincoln Mills, supra*, has now directed federal courts to develop and apply a substantive body of federal law fashioned from the policy of our national labor laws to govern the relations of the parties to such agreements. 353 U. S. at p. 456. So far as we can determine this is the first case to arise since *Lincoln Mills* in which it can be said that the provisions, though not the policies, of the Norris-LaGuardia Act and of the more recent Labor Management Relations Act of 1947 are in conflict. The courts below have now successively differed in determining the respective policies of these statutes and in applying them to these cases.

Underlying the specific questions presented there is, moreover, the broader question of whether, in accommodating the complementary purposes of our various labor laws, the federal courts are to confine themselves to a strict and literal reading of the particular provisions of those laws or whether they are to follow "the different path" of accommodating and reconciling their broader purposes, the declared policies of Congress in enacting those laws.

In view of the prevalence of no-strike clauses in modern collective bargaining agreements and the fact that such clauses are often the primary consideration secured by employers in the collective bargaining process, questions as to the enforceability of such clauses are of widespread significance. In these cases, and we submit in many others, such clauses can be effectively enforced only through the use of injunctive powers.

A decision that such powers are not available in carrying out the Congressional purpose to secure industrial peace through the mutual enforceability of collective bargaining agreements, should not go unreviewed.

As noted, there is also presented in the officers' case a fundamental question as to the position of supervisors under our national labor laws.

These cases are also of transcendent importance to the economy of the Commonwealth of Puerto Rico inasmuch as Bull, a common carrier, is its chief link to the American East Coast, carrying in excess of 80% of all general cargo outbound from Puerto Rico to New York and other East Coast ports and in excess of 60% of all shipments originating on the East Coast for Puerto Rico. See R. A 91-A 93 and Bull's stay application to this Court filed December 3, 1957.

It is, we submit, in the public interest that this Court settle these questions at this stage, not only because of the unquestionable impact which the decisions of the Court of Appeals will have in other situations but also because of their impact on the future conduct of this litigation. The interlocutory nature of the orders sought to be reviewed should not, in this case, militate against granting certiorari. See *Larson* v. *Domestic & Foreign Group*, 337 U. S. 682 (1949); *Deckert* v. *Independence Shares, Inc.*, 311 U. S. 282 (1940); and, for a case arising in connection with interlocutory orders in a labor context, *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437 (1948). In any event, the decisions below effectively and, for all practical purposes, finally dispose of Bull's claim for injunctive relief.

B.

1. The decisions of the Court of Appeals below are believed erroneous and in conflict with the principles of applicable decisions of this Court, namely, *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U. S. 448 (decided June 3, 1957); *Syres* v. *Oil Workers Union,* 350 U. S. 892 (1955); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.,* 353 U. S. 30 (1957); *Graham* v. *Brotherhood of Firemen and Enginemen,* 338 U. S. 232 (1949); and *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937).

Although the attention of the Court of Appeals was directed to all of the foregoing cases, only *Lincoln Mills* was treated in the opinions and, as noted, the teaching of that decision was not followed. The *Alcoa, Mead* and other decisions upon which the Court of Appeals did rest its opinion are clearly distinguishable in that in none of those cases was the violation of a no-strike clause involved.

This Court has found that Section 301 "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations, and that industrial peace can be best obtained only in that way." *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U. S. at p. 455. The Court recognized that variations of Congressional policy are embodied in our different labor laws and pointed out how, in the past as well as in *Lincoln Mills* itself, these divergent, if not conflicting, statutes were to be reconciled or "accommodated." See Justice Douglas' opinion for the Court, at pages 457-459, discussing the earlier cases under the Railway Labor Act, and compare *General Electric Co.* v. *Local 205,* 353 U. S. 547, handed down with *Lincoln Mills.* See also *Trainmen* v. *Chicago River & Indiana R. R. Co.,* 353 U. S. 30, 40-42, decided March 25, 1957, rehearing denied, *id.,* p. 948.

Thus it has been established that, Norris-LaGuardia notwithstanding, the injunctive remedy is available to secure statutory rights to non-discriminatory representation both

under the Railway Labor Act (in *Graham* and *Virginian Railway, supra*) and the National Labor Relations Act (in *Syres, supra*). It has also been held (in *Chicago River, supra*) that, under the Railway Labor Act, a federal court may properly enjoin a strike in order to effectuate the Congressional purpose of securing the enforcement of the collective bargaining agreements of railroad employees.

Just as Congress has selected arbitration as the chosen instrument for the resolution of "minor disputes" in the railroad industry, so it has selected litigation as the means to resolve claims of violations of collective bargaining agreements generally. Thus, the cases at bar bring Section 301 to the same crossroads to which the Railway Labor Act came in *Chicago River, supra.* Without injunctive powers, federal courts simply cannot enforce collective bargaining agreements; damages are not a practical alternative especially in the case of a common carrier (see the Seventh Circuit's opinion in *Chicago River,* 229 F. 2d 926 at 932 affirmed, *supra,* 353 U. S. 30).

Nevertheless the Court of Appeals has ruled that the provisions of Norris-LaGuardia are, for all purposes, paramount and, absent an express repeal or amendment of that statute, they must prevail against the later policy expressed in Section 301 to render collective bargaining agreements enforceable in the federal courts. Thus the Court of Appeals rejected *Lincoln Mills.* It refused to recognize as an alternative to repeal of Norris-LaGuardia the accommodations of the policies of that Act and of the National Labor Relations Act. In the Railway Labor Act cases, the courts did not shrink from such an accommodation. Nor did this Court in *Lincoln Mills.* There is a vast difference between exercising "judicial inventiveness" (*Lincoln Mills,* p. 457) to fashion a body of law consonant with the policies of both Acts and concluding that the exercise of such inventiveness is inappropriate if it would result in an apparent *pro tanto* repeal of the earlier statute. There is involved here no question of repeal by implication. Rather the question is how to accomplish the purposes of both Acts. The net effect

of the Court of Appeals' avoidance of *Lincoln Mills* is that collective bargaining agreements are not enforceable where a union not only ignores its affirmative obligations but goes further and breaches its no-strike covenant. Therefore, these cases speak as compellingly for the grant of certiorari as did *Lincoln Mills* or the comparable cases under the Railway Labor Act.

Given the thesis that a union may expressly contract away its right to strike for economic benefits (See, e. g., *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 279-280 [1956]; cf. *Labor Board* v. *Lion Oil Co.,* 352 U. S. 282, 293 [1957]) coupled with the declared Congressional policy, embodied in Section 301, of promoting industrial peace through mutual enforcement of collective bargaining agreements, we come to the crux of this case: Does the Norris-LaGuardia Act render federal courts powerless to compel a union to perform its contractual obligations when it deliberately goes beyond breaching its affirmative obligations and, in addition, declares a strike which, in turn, is expressly outlawed by contract?

In returning an affirmative answer to this question, the Court of Appeals stressed Congress' purpose, evidenced by Norris-LaGuardia, to encourage collective bargaining; it largely ignored its later concern, expressed in Section 301, to enforce the agreements which eventuate from the bargaining process. It is to this Court that we must now turn for a definitive reconciliation of the policies and purposes of both statutes.

2. Of almost equal importance is the question, raised in the officers' case, whether supervisors' unions which enter into collective bargaining agreements with employers are entitled to the benefits, and must accept the burdens, of Section 301. The Court of Appeals has answered this question by rigidly applying the statutory definitions. Cf., National Labor Relations Act, as amended, §§ 2(3), (5), (11), and 14, 61 Stat. 137-8, 151; Labor Management Relations Act, 1947, § 501(3); 61 Stat. 161. Its decision, if accepted in all its generality, would mean that these defini-

tions must be so applied wherever the defined terms appear in the Act.

So viewed, its decision is in conflict with the decision of the Fifth Circuit in *W. T. Smith Lumber Co.* v. *NLRB,* 246 F. 2d 129, 131-2 (1957) following *International Rice Milling Co.* v. *NLRB,* 183 F. 2d 21, 24-5, reversed on other grounds, 341 U. S. 665 (1951). There the Fifth Circuit refused to construe the term "employees" as it appears in Section 8(b)(4)(A) of the Act to exclude railroad workers although railroad workers would appear to be excluded by the express language of Section 2(3) in precisely the same manner as "supervisors" are excluded.

We submit that the clause in Section 301(a) ". . . as defined in this Act . . ." must be limited to the immediately preceding phrase, "in an industry affecting commerce", inasmuch as the term "affecting commerce" is specifically defined in Section 2(7), 29 U. S. C. § 152(7). Cf. Section 301(b), 29 U. S. C. § 185(b). Clearly Congress' concern was to establish a constitutional basis for federal jurisdiction. There is no available evidence that it intended more. Indeed, much of the Act and virtually all of Title III would be rendered anomalous if "employees" is to be read uniformly as excluding "supervisors" as well as the other categories delimited in Section 2(3). For instance, Section 304, 61 Stat. 159, amending Section 313 of the Federal Corrupt Practices Act, 2 U. S. C. § 251, would leave immune from prosecution for the offenses therein defined any "labor organization" which limits its membership to supervisors. A more palpable affront to the Congressional intent can hardly be imagined. Consideration is also invited to the inevitable distortion such a reading gives to the "anti-racketeering" provisions of Section 302 and to the impact upon the private damage actions accorded those injured as a result of secondary boycotts provided in Section 303.

It is submitted, further, that the Court of Appeals also fell into error and, at the same time, brought itself into conflict with the Sixth Circuit's decision in *Labor Board* v.

Edward G. Budd Manufacturing Co., 169 F. 2d 571 (1948), in its holding that the persons covered by the particular contract which is the subject of a Section 301 action must be "employees" as defined in Section 2(3), it being the clear holding of the *Budd* case, 169 F. 2d at pages 576-577, that a union which admits both supervisors and non-supervisors to membership is still a "labor organization" within the meaning of Section 2(5).

3. Norris-LaGuardia was enacted to protect the collective bargaining rights of the "individual unorganized worker" (29 U. S. C. § 102). There is a grave question as to whether a ship's officer can be properly so classified. Cf. *American Medical Association* v. *U. S.*, 130 F. 2d 233, 242, notes 30-32 (D. C. Cir., 1942) aff'd 317 U. S. 519. Even if it be assumed that he can, the question remains as to whether in 1947 Congress, through Section 14(a) of the Labor Management Relations Act, 29 U. S. C. § 164(a), did not remove "supervisors" from the protection of all labor laws, "either national or local, relating to collective bargaining" including Norris-LaGuardia. To date, other than the courts below, no federal court appears to have faced this question but see *260 Madison Avenue Corp.* v. *Nelson*, 284 App. Div. (N. Y.) 254, 131 NYS 2d 426 (1954).

4. Finally, there is tendered as to MEBA the issue of the manner in which the Court of Appeals limited the doctrine of "pendent jurisdiction" as first elaborated by this Court in *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175 (1909) and further expounded in *Hurn* v. *Oursler*, 289 U. S. 238 (1933). The decision of the Court of Appeals below, in denying the applicability of this doctrine to applications for preliminary relief, is in conflict with this Court's decision in *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298 (1913).

The doctrine of "pendent jurisdiction" presupposes a complaint setting forth a single claim for relief but asserting two distinct grounds, one federal and one non-federal, as a basis for the relief demanded. In this event, so long

as the federal ground presents a substantial question and is not frivolous or sham, the federal court has jurisdiction of the case for all purposes. If it then eventuates that there is no basis for relief upon the federal ground, the court will nevertheless retain jurisdiction and dispose of the case on the non-federal ground. See *Hurn* v. *Oursler, supra,* at p. 246 *et seq.*

The decision of the Court of Appeals limits the doctrine to those cases—at least to those "labor cases"—where "a federal court in disposing of a federal ground for relief hears evidence concerning the merits of a similar non-federal ground not otherwise subject to its jurisdiction . . ." This analysis, however, excludes cases where the federal ground can be resolved at the outset as a matter of law. As this Court pointed out in *Binderup* v. *Pathe Exchange,* 263 U. S. 291 at p. 305: "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. . . . Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit."

Consonant with this view, this Court has sustained the exercise of pendent jurisdiction in cases where the federal ground has not been considered at all and the cause disposed of on state grounds (e. g., *Siler* v. *Louisville & Nashville R. R. Co., supra*) and in cases where the federal ground has been considered and rejected as a matter of law (e. g. *Louisville & Nashville R. R. Co.* v. *Garrett, supra; Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593 [1926]). The decision below is in direct conflict with these cases. Moreover if the rule enunciated by the Court of Appeals is to be regarded as a special rule for labor cases only, its decision is in conflict with this Court's holding in *Hurn* v. *Oursler, supra,* p. 245, that the rule of pendent jurisdiction is "a rule of general application."

CONCLUSION

For the foregoing reasons this Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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December 13, 1957

APPENDIX A

Opinions Below

I. District Court Opinion—SIU Case (R. A 59-A 66):

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

A. H. BULL STEAMSHIP CO.,
Plaintiff,
against
SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,
Defendant.

CIVIL NO. 18007
SEPTEMBER 27, 1957

BRUCHHAUSEN, D. J.

The plaintiff, an operator of ships engaged in the transportation business, instituted this action against the defendant, Labor Union, for specific performance of a collective bargaining agreement, entered into between the parties and for other relief. The subject motion is for provisional remedies, enforcing the agreement, pendente lite.

The facts, not in dispute, in substance, are as follows:

1. That the parties entered into a collective bargaining agreement in October 1956, which will not expire by its terms until September 30, 1958.

2. That the agreement and predecessor agreements contain a provision that there shall be no strikes, lockouts or stoppages of work while the provisions of the agreement are in effect.

3. That the defendant shall furnish to the plaintiff capable and competent personnel in ample time to prevent any delay in the scheduled departure of its vessels.

4. That on August 19, 1957, the defendant called a strike against the plaintiff and that the strike has been in existence ever since.

On June 17, 1957, the defendant served upon the plaintiff a notice to open negotiations for a revision of wages and other monetary matters and negotiations were had, which were unsuccessful.

The plaintiff contends that the defendant entered into the negotiations in bad faith and that its motive was to use them to further its attack on American Coal Shipping Inc., which has taken over stock control of the plaintiff. That claim has no particular relevance at this time.

The said collective bargaining agreement fails to clothe the defendant with the right to strike or to breach the agreement for any of the reasons advanced by the plaintiff. The only reference therein to the opening of negotiations for changes in the agreement is that they may be discussed but no right was thereby conferred upon either party to terminate the agreement on that account. The provision so referred to is that "applications by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement."

The work stoppages have caused and are causing serious loss, damage and irreparable injury to the plaintiff for which it has no adequate legal remedy.

The principal question herein pertains to the interpretation of certain provisions of the 1932 Norris-LaGuardia Act and of the later act, the Labor Management Relations Act of 1947. The Norris-LaGuardia Act of 1932 (29 U. S. C. 101 et sequa), particularly Section 104 thereof, sets forth in substance that no federal court shall issue any order

restraining a person or persons, involved in a labor dispute, from ceasing or refusing to perform any work, whereas Section 301 of the Labor Management Relations Act of 1947 (29 U. S. C. 185) conferred jurisdiction upon the federal courts in suits for violation of contracts between an employer and a labor organization engaged in interstate commerce, regardless of the amount in controversy or the citizenship of the parties.

It will be recalled that in 1932, during the depth of the economic depression, collective bargaining in the labor field was practically non-existent. The legislative policy, proclaimed in Section 102 of the 1932 Norris-LaGuardia Act was that workers should be unhampered in organizing. It was stated therein that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."

The said 1932 Act was aimed at correcting "existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction." *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad Co.*, 353 U. S. 30, 40.

The aforementioned Section 104 of the Norris-LaGuardia Act thus removed jurisdiction that the federal courts possessed, though by circuitous route. Employers, hampered by local law, would work their way into federal courts, before the decision in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and obtain favorable jurisdiction in Labor disputes, resulting in strike injunctions.

Section 301 of the Labor Management Relations Act of 1947 vested federal courts with jurisdiction to impose certain responsibility upon labor unions which had not theretofore prevailed. The significant element of Section 301 of the said Act was not that unions had the right to resort to the federal courts, since they could always have

done so, if the other jurisdictional requirements were met, just as employers were entitled to do, within the limitations of the 1932 Act, but that in cases involving labor contracts, the federal courts by Section 301 were accorded complete jurisdiction, regardless of the amount involved, or of other jurisdictional requirements, and that in order to make labor unions amenable to such jurisdiction, they could be sued as an entity and money judgments could be enforced against their assets, though not against the assets of the individual members.

The 1932 Norris-LaGuardia Act circumscribed federal jurisdiction, only after other jurisdictional requirements, such as diversity, or amount involved etc., were met. On the other hand, the Labor Management Relations Act of 1947 conferred such jurisdiction.

In situations not involving labor contracts, such as collective bargaining agreements, employers are governed by local law as well as by the Norris-LaGuardia Act. However, by the enactment of the Labor Management Relations Act of 1947 and particularly Section 301 the Congress extended the jurisdiction of the federal courts, without reservation, to labor contract disputes whereas in the earlier 1932 Act, it limited such jurisdiction, as stated in Section 104, despite compliance with the other jurisdictional requirements. The said Section 104 constituted a complete restriction, not only as to labor contract controversies but also as to numerous other labor suits instituted in the federal courts.

In the interest of industrial peace, the federal courts under the 1947 Act were given jurisdiction of labor contracts without reservation or denial of any of their other inherent or traditional powers, legal or equitable. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448.

Labor was not thereby stripped of its primary weapon without the substitution of any reasonable alternative.

Brotherhood of Railroad Trainmen et al. v. *Chicago River & Indiana R.R. Co., supra.*

That the primary objective of the 1932 Norris-LaGuardia Act was to aid workers in their efforts to organize and enter into collective bargaining agreements, rather than the consideration of the rights and remedies of the parties thereunder, subsequent to the execution of such agreement, is emphasized in the latter mentioned case, wherein the Court said:

> "The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining."

A principal purpose of the more recent Act, the Labor Management Relations Act, 1947, not contemplated by the Norris-LaGuardia Act, was the enforcement of collective bargaining agreements. It provides that "suits for violation of contracts between an employer and a labor organization • • • may be brought in any district court of the United States • • •." (Section 301(a)).

In the recent case of *Textile Workers of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448 (decided June 3, 1957), the plaintiff Union invoked the jurisdiction of the federal court under said Section 301 (also referred to as 29 U. S. C. 185) to compel the defendant, the employer, to submit to arbitration, as provided for by the terms of the collective bargaining agreement, entered into between the parties. The agreement also contained a no-strike clause, similar to the one in the case at bar. The Court, in its opinion, quoted from the Senate and House Reports, which preceded the enactment of the statute. It appears in both reports that the primary concern was that unions and employers should both be bound to collective bargaining contracts and be governed by "the usual processes of the law."

The intent and purpose of the proposed legislation, reported by the Senate, quoted in the opinion in the *Textile Workers* case, in substance, is as follows:

1. That the chief advantage which an employer can reasonably expect from a collective labor agreement is the assurance of uninterrupted operation during the term of the agreement.

2. That without some effective method of assuring freedom from economic warfare for the term of the agreement there is little reason why an employer would desire to sign such a contract.

3. That to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the federal courts.

4. That Section 185 in the proposed law provides for suits by and against unions as legal entities.

It will be noted that the Senate Committee, so reporting, did not limit faithful performance to any particular breach or to any particular party, committing the breach. It clearly meant to insure faithful performance of the entire agreement to the end that there should be industrial peace. There could be no such assurance if either party, at will, might breach the contract by refusal to perform, and there be no adequate enforcement procedure. Non performance, without the remedy of enforcement, would completely set at nought the object of the statute, as so stated, and render the legislation practically impotent.

The Court in the *Lincoln Mills* case, *supra*, in analysis of the said House and Senate Reports, wrote:

> "Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' Id., p. 15. As stated in the House Report, supra, p. 6, the new provision 'makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts.' To repeat, the Senate Report, supra, p. 17, summed up the philosophy of Section 301 as follows: 'Statutory recognition of the collective agreement as a valid, binding,

and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.' "

In the *Lincoln Mills* case, *supra*, the Court further said:

"Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way. * * *

"Though a literal reading (of provisions of the Norris-LaGuardia Act) might bring the dispute within the terms of the Act (see Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 602-604) we see no justification in policy for restricting Section 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act. Moreover, we held in Virginian R. Co. *v.* System Federation, 300 U. S. 515, and in Graham *v.* Brotherhood of Firemen, 338 U. S. 232, 237, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act. The mandates there involved concerned racial discrimination. Yet those decisions were not based on any peculiarities of the Railway Labor Act. We followed the same course in Syres *v.* Oil Workers International Union, 350 U. S. 892, which was governed by the National Labor Relations Act. There an injunction was sought against racial discrimination in application of a collective bargaining agreement; and we allowed the injunction to issue. The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of Section 7 of the Norris-LaGuardia Act."

It is plain that the statute empowers this Court to invoke the remedy of specific performance, also that the undisputed facts presented warrant such procedure. That remedy embraces affirmative as well as negative acts. *Kulukundis Shipping Co.* v. *Amtorg Trading Corporation,* 2 Cir., 126 F. 2d 978.

The plaintiff's motion is granted. The defendant's cross motion is denied. Settle order on two days' notice at which time the parties may submit their proposals as to security and preference of the trial.

/s/ WALTER BRUCHHAUSEN
U. S. D. J.

II. District Court Opinion—Officers' Case (R. 112a-120a):

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

A. H. BULL STEAMSHIP CO.,
Plaintiff,
against
NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO,
Defendants.

CIVIL NO. 18060
OCTOBER 17, 1957

BRUCHHAUSEN, D. J.

The plaintiff, an operator of ships engaged in cargo transportation, instituted this action against the defendants for specific performance of collective bargaining agreements, made between the plaintiff and each of the defendants. The subject motion is for provisional remedies, enforcing the agreements, pendente lite.

The defendant, National Marine Engineers' Beneficial Association, AFL-CIO is hereinafter called "MEBA."

The defendant, International Organization of Masters, Mates and Pilots, Inc., AFL-CIO is hereinafter called "MMP."

The plaintiff and the defendant, MEBA, as representative of the licensed engineering officers, employed aboard the plaintiff's vessels, entered into a collective bargaining agreement, bearing date June 18, 1955, which by its terms does not expire until June 15, 1958. The agreement provided that "there shall be no strikes, lockouts or stoppages of work during the period of this agreement," also griev-

ance procedure, for the arbitration of all disputes, relating to its interpretation or performance. It also obligated the defendant MEBA to furnish plaintiff on call, and as the plaintiff might from time to time, require, competent and fit licensed officers to serve aboard plaintiff's vessels.

The plaintiff and the defendant, MMP, as the representative of Licensed Deck Officers, other than the Masters of vessels, entered into a similar agreement, bearing date July 1, 1955, expiring on September 30, 1958, which agreement contained an additional provision, viz.:

> "It is understood that in the event a picket line is established against any vessel, the Licensed Deck Officers of such vessel will report and perform all of their normal duties incidental to the security of the vessel, passengers and cargo, provided that no Licensed Deck Officer shall be required to work under conditions which may endanger his health or safety. The Organization undertakes to use its best efforts to obtain clearance for such purpose from the Union establishing the picket line."

On or about August 19, 1957 each defendant called a strike against the plaintiff. The strikes have been on ever since.

Prior to the aforesaid work stoppages, negotiations were had, pursuant to wage reopening clauses contained in the agreements. The parties came to no agreement thereon. The plaintiff contends that no dispute then existed between the parties, excepting that the defendants claimed that their members, employed by the plaintiff, had a feeling of insecurity because of fears that the plaintiff's parent corporation, American Coal Shipping, Inc., whose officers were not and are not represented by the defendants, might take over plaintiff's operations, also that the defendants declined to arbitrate the matter. Significantly, MEBA admits that, besides demanding a 6% wage increase, it requested an additional amount for its engineer members "sufficient to compensate them for a possible complete loss of their jobs through the transfer of their vessels to American Coal"

(Exhibit E, attached to affidavit of Herbert L. Daggett, sworn to October 9, 1957). MMP makes a similar admission (affidavit of Charles T. Atkins, October 8, 1957, at page 4). It appears that the plaintiff acquiesced in the 6% wage increase, which had previously been generally adopted in the dry cargo shipping industry.

In neither agreement is the no-strike clause qualified by the wage reopening clause. The defendants, by the terms of the agreements, were not entitled to strike by reason of the collapse of the wage negotiations, whatever the cause.

The work stoppages have caused and are causing serious loss, damage and irreparable injury to the plaintiff for which it has no legal remedy.

As to the Defendants' Claim That the Court Has No Jurisdiction of the Action

The plaintiff, in its complaint, alleged as the basis for jurisdiction the diversity of citizenship of the parties and Section 301 of the National Labor Management Act, 1947 (29 U. S. C. A. 185).

There is complete diversity between the plaintiff, a Delaware corporation, and the defendant, MMP, a New York corporation. This cause of action is separate and apart from the plaintiff's case against the defendant MEBA.

There is some doubt as to whether diversity exists in the action between the plaintiff and MEBA, in that there is evidence that some of the members of MEBA reside in the State of Delaware, the same State wherein the plaintiff was and is incorporated.

This leads to a consideration of the second alleged ground of jurisdiction, the aforesaid Section 301 of the National Labor Management Act, 1947, which vests District Courts with jurisdiction of "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act * * * without respect to the amount in

controversy or without regard to the citizenship of the parties."

The defendant, MEBA, contends that it is not "a labor organization" and the individuals it represents are not "employees," as those terms are defined in the Act, but that they are "supervisors." Section 2(3) of the Act provides that supervisors shall not be deemed employees. Supervisory personnel are in the category of management and, therefore, were and are not within the scope and purpose of the statute.

The plaintiff claims that in various prior proceedings the defendant MEBA made admissions that it was "a labor organization," while, on the other hand, the said defendant challenges those statements or their effect and alleges that the individuals are "supervisors," within the meaning of the Act. As to the present application, it is not necessary to adjudicate these issues, other than to find, as this Court does find that the plaintiff presents a substantial Federal question and that this Court can decide the matter only after it has assumed jurisdiction over the controversy. The complaint herein alleges the violation of a single right, the right to have its agreement performed and a single claim for relief. Under these circumstances, the Court assumes jurisdiction of the action. *Strachman* v. *Palmer*, 177 F. 2d 427; *Hurn* v. *Oursler*, 289 U. S. 238 and *Brown* v. *Haldale Estates, Inc.*, 151 F. Supp. 118.

The defendants further contend, that even if this Court should have jurisdiction of the action by reason of diversity or otherwise, such jurisdiction is controlled or limited by the Norris-LaGuardia Act of 1932 (29 U. S. C. 101 et sequa), particularly Section 104 thereof, which provides, in substance, that a Federal Court may not issue an injunction in a "labor dispute."

At the time of enactment of that law, the country was in the grip of a severe economic depression and collective bargaining was practically non-existent. The legislative policy, proclaimed in Section 102, emphasizing that workers

should be unhampered in their efforts to organize, stated that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." To the same effect is the statement in the recent case of *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448, viz.:

> "The Norris-LaGuardia Act * * * was designed primarily to protect working men in the exercise of organized, economic power which is vital to collective bargaining."

Clearly, the purpose of the statute was to force employers to bargain collectively with their employees.

Likewise, it is plain that the Congress intended that "Supervisors" should not be governed by that Act, or by any other national or local law in that in Section 14(a) (29 U. S. C. 164(a)) of the National Labor Management Act, 1947, it is stated that "no employer * * * shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

The intent of Congress that supervisory personnel should be regarded as part of the management for the purpose of collective bargaining is disclosed in the report of the House Committee on Education and Labor, H. R. Report No. 345, 80th Congress, First Session, 1947. See also *National Labor Relations Board* v. *Edward G. Budd Manufacturing Co.,* 169 F. 2d 571, 578 and *L. A. Young Spring & Wire Corp.* v. *National Labor Relations Board,* 163 F. 2d 905, 906.

A dispute between an employer and a supervisory union over the terms of employment of its members, therefore, is no more a "labor dispute" than a disagreement between officers of a corporate entity or any other group of employers. See *260 Madison Avenue Corp.* v. *Nelson,* 284 App. Div. 254.

It follows that the Norris-LaGuardia Act does not affect or bar the plaintiff herein.

In the absence of statutory restriction, such as set forth in that Act, a Federal Court has the power to enjoin. *Gomez* v. *United Office and Professional Workers,* 73 F. Supp. 679, 683.

Furthermore, where New York law is applicable, it should be followed by a Federal Court. *Guaranty Trust Co.* v. *York,* 326 U. S. 99. The New York Courts have granted injunctions in cases of violations of no-strike clauses. *Stewart Stamping Corp.* v. *Uprichard,* 133 N. Y. S. 2d 579, order affirmed 284 App. Div. 902; *Bee Line* v. *Long Island Local 252, Etc.,* 157 N. Y. S. 2d 232 and *Schlessinger* v. *Quinto,* 117 Misc. 735, affirmed in 201 App. Div. 487.

In the said *Schlessinger* case in the lower court, Mr. Justice Wagner, later a member of the United States Senate, said:

> "It is elementary, and yet sometimes requires emphasis, that the door of a court of equity is open to employer and employee alike. It is no respecter of persons—it is keen to protect the legal rights of all."

The Appellate Court in sustaining the injunction decree granted by Mr. Justice Wagner, pointed out that the officials of a labor union are obligated to exercise their powers of requiring performance of the contract by the Union members. The Court, on this point, said:

> "Two organizations, one composed of employers and the other of employees, have entered into an agreement. Each had power through the consent of its members to enter into a binding obligation in their behalf. By the constitution or by-laws of each, power is given to the organization to enforce, through disciplinary proceedings which have been demonstrated to be effective, compliance with the terms and conditions to which it has subscribed. This contract has mutual obligations binding on the parties thereto. Each party knows the obligation that it has assumed

and the consequences of failure or refusal to perform those requirements. Through its control of its members it can compel performance. Under such circumstances, a decree of a court of equity can be enforced against either party and in favor of the other. Grassi Contracting Co. *v.* Bennett, 174 App. Div. 244, 248, 160 N. Y. Supp. 279. An organization, having such power to require performance by individual members, can through its officers be compelled to exercise that power. There is in this contract a mutuality of obligation, and there is also a mutuality of remedy for its enforcement."

While in the recent case of *Textile Workers of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448 (decided June 3, 1957), the plaintiff therein, a labor union, invoked the Court to act, pursuant to Section 301 of the 1947 Act, and to order the defendant, the employer, to submit to arbitration, as provided by the terms of the collective bargaining agreement, entered into between the parties, it has an important bearing upon the instant controversy. It also contained a no-strike clause, similar to the one in the case at bar. The Court, in its opinion, in the said case quoted from the Senate and House Reports, which preceded the enactment of the statute. It appears in both reports that the primary concern was that unions and employers should both be bound to collective bargaining contracts and be governed by "the usual processes of the law."

The intent and purpose of the legislation, reported by the Senate, quoted in the said opinion, in substance, is as follows:

1. That the chief advantage which an employer can reasonably expect from a collective labor agreement is the assurance of uninterrupted operation during the term of the agreement.

2. That without some effective method of assuring freedom from economic warfare for the term of the agreement there is little reason why an employer would desire to sign such a contract.

3. That to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the federal courts.

It will be noted that the Senate Committee, so reporting, did not limit faithful performance to any particular breach or to any particular party, committing the breach. It clearly meant to insure faithful performance of the entire agreement to the end that there should be industrial peace. There could be no such assurance if either party, at will, might breach the contract by refusal to perform, and there be no adequate enforcement procedure.

The facts and the law warrant the remedy of specific performance, which embraces affirmative as well as negative acts. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 126 F. 2d 978.

The plaintiff's motion is granted. The defendants' cross motions are denied. Settle order on two days' notice at which time the parties may submit their proposals as to security and preference of the trial.

WALTER BRUCHHAUSEN
U. S. D. J.

III. Court of Appeals Opinion—SIU Case (R. A 73-A 84):

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 123—October Term, 1957.

(Argued October 8, 1957 Decided November 21, 1957.)

Docket No. 24840

A. H. BULL STEAMSHIP CO.,
Plaintiff-Appellee,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,
Defendant-Appellant.

Before:

CLARK, *Chief Judge,* and
LUMBARD and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO, appeals from the grant of an injunction, *pendente lite,* restraining it from continuing a peaceful strike claimed to be in violation of its collective bargaining agreement with plaintiff, A. H. Bull Steamship Co. Reversed and remanded.

CLARK, *Chief Judge:*

A. H. Bull Steamship Co. brought suit below against the defendant Union seeking declaratory and injunctive relief and damages for the defendant's alleged breach of the collective bargaining agreement between the parties. Bull then moved for a preliminary injunction restraining the Union from continuing the peaceful strike then in progress, which constituted the alleged breach of contract. The trial court heard the motion on affidavits and briefs and entered an injunction *pendente lite* of substantial scope against continuance of the strike.[1] This appeal from the order of injunction followed.

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[1] The main provisions of the injunction are contained in the following paragraphs:

> "Ordered that, effective on October 1, 1957, at 5 P. M., Eastern Daylight Savings Time, defendant, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, Atlantic and Gulf District, AFL-CIO, its officers, agents, members, servants, employees, attorneys, and all persons in active concert or participation with them, who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking, or inciting, causing, inducing, or, in any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. H. BULL STEAMSHIP CO., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is
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> "Further Ordered that the said defendant specifically perform its agreement to furnish the plaintiff with capable, competent, and physically fit persons when and where they are required, and of the ratings needed to fill vacancies necessitating the employment of Unlicensed Personnel, in ample time to prevent any delay in the scheduled departure of any vessel covered by said agreement, * * *"

Defendant objects to the scope of the injunction as to parties defendant, as well as plaintiff, and to the findings incorporated in the opinion as made without a hearing for the presentation of testimony. We do not reach these issues.

The basic facts are not in dispute. Bull is an operator of ships engaged in interstate commerce. The Union represents unlicensed personnel aboard Bull's ships. The parties entered into a collective bargaining agreement effective October 15, 1956, which runs until September 30, 1958. The agreement provides in part that "[t]here shall be no strikes, lockouts, or stoppages of work" while its provisions are in effect. On June 17, 1957, the Union sought to renegotiate certain wages. These negotiations were unsuccessful and on August 19, 1957, the Union called a strike which still continued when the trial court issued its order. The parties disagree as to the scope of the no-strike clause and whether a strike over wages constitutes a breach of the agreement. We do not decide this issue because we hold that in any event the trial court exceeded its jurisdiction in issuing the preliminary injunction.

Section 4 of the Norris-LaGuardia Act of March 23, 1932, 29 U. S. C. § 104, deprives federal courts of jurisdiction to issue injunctions which prohibit peaceful strikes in cases "involving or growing out of any labor dispute." No one controverts that this is a peaceful strike. Section 13(c) of the Act, 29 U. S. C. § 113(c), provides:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

This case involves an impasse in renegotiation of wages. The Union maintains that the no-strike clause has no application to a strike for this purpose. Bull contends otherwise. But the basic controversy concerns wages—terms or conditions of employment—and thus, under § 13(c), this is a labor dispute. Nothing in the Act makes its provisions inapplicable where, after a labor dispute arises, one party

takes action which constitutes a breach of a contract between them. It is immaterial that the strike might be a breach of the Union's duty under the collective bargaining agreement or that the controversy itself might be determined by reference to it. *W. L. Mead, Inc.* v. *International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 1 Cir., 217 F. 2d 6; *In re Third Avenue Transit Corp.,* 2 Cir., 192 F. 2d 971; *Alcoa S. S. Co.* v. *McMahon,* D. C. S. D. N. Y., 81 F. Supp. 541, affirmed 2 Cir, 173 F. 2d 567, certiorari denied 338 U. S. 821. Hence under § 4 of the Act, if still applicable, the trial court would lack jurisdiction to issue its preliminary injunction in the present labor dispute.

So much appears to be common ground between the parties and with the court. The real issue is whether or not there has been a repeal by implication of the Norris-LaGuardia Act. The court found that § 301 of the Taft-Hartley Act of June 23, 1947, 29 U. S. C. § 185, as interpreted in *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448, authorized it to issue the injunction. The question thus presented is whether or not this later statute repeals the Norris-LaGuardia Act to the extent that federal courts will now have jurisdiction to enjoin a peaceful strike which constitutes a breach of a non-strike clause in a collective bargaining agreement. As Bull itself states, "[t]his Court's problem is to reconcile these two laws, in the light of the circumstances of this case and of the Supreme Court's decision of June 3, 1957 in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448."

Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce • • • may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Textile Workers Union of America v. *Lincoln Mills of Alabama, supra,* 353 U. S. 448, does clearly hold that this section is more than procedural and gives substantive rights grounded in a body of federal law which in a proper case may be enforced by equitable relief. There the collective bargaining agreement between the union and the employer included both an arbitration clause and a no-strike clause. After grievance procedures had been exhausted to no avail, the union demanded that the employer arbitrate differences concerning work loads and work assignments. The employer refused, and the union brought an action under this statute in the federal district court to compel the employer to arbitrate. The district court concluded that it had jurisdiction and ordered the employer to comply with the arbitration provisions. The Court of Appeals reversed this determination and the Supreme Court reversed the Court of Appeals. The Supreme Court held that § 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." 353 U. S. 448, 451.

But this case does not say that § 301 authorizes federal courts to issue injunctions when that remedy is clearly prohibited by the Norris-LaGuardia Act. The Court does hold, after an analysis of legislative history, to reach the conclusion just quoted, that the issuance of an order compelling arbitration was not prohibited by the Norris-LaGuardia Act. The Court reasoned that refusal to arbitrate is not protected conduct under § 4, 29 U. S. C. § 104, and is not the kind of conduct which had given rise to abuse of the power to enjoin. Indeed the Court found that § 8, 29 U. S. C. § 108, indicates a congressional policy favoring the settlement of labor disputes by arbitration. The Court next dealt with § 7, 29 U. S. C. § 107. This section, in addition to § 4, deprives federal courts of jurisdiction to issue injunctions in cases involving labor disputes unless the court makes

specific findings of fact and follows prescribed procedural requirements.[2] Citing Judge Magruder in *Local 205, United Electrical, Radio and Machine Workers of America (UE) v. General Elec. Co.*, 1 Cir., 233 F. 2d 85, 92, affirmed *General Elec. Co. v. Local 205, United Electrical, Radio and Machine Workers of America (U. E.)*, 353 U. S. 547, the

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[2] Sec. 7, 29 U. S. C. § 107, provides in part:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property . . ."

Court found these procedures "inapposite" and concluded that: "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act." 353 U. S. 448, 458.[3]

In the case at bar the Union's conduct comes squarely within § 4 of the Norris-LaGuardia Act. This is a lawful and peaceful strike which Congress said a federal court may not enjoin. The Supreme Court in *Lincoln Mills* was concerned with a refusal to arbitrate—conduct not protected by § 4 and at odds with congressional policy. It did not involve a strike—the issue here. The ultimate question in *Lincoln Mills* was whether or not Congress by § 301 of the

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[3] Judge Magruder had concluded that:

"Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of § 7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also § 9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom, if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended § 7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts." 233 F. 2d 85, 92.

Taft-Hartley Act authorized the federal courts to compel arbitration. The question here is whether or not Congress by that same provision intended to repeal the Norris-LaGuardia Act *pro tanto*. This is not the question which was before the Supreme Court.[4]

Prior to the Supreme Court's decision in *Lincoln Mills* both this Circuit and the First Circuit had agreed that § 301 did not impliedly repeal the Norris-LaGuardia Act. *Alcoa S. S. Co.* v. *McMahon, supra*, 2 Cir., 173 F. 2d 567, certiorari denied 338 U. S. 821; *W. L. Mead, Inc.* v. *International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra*, 1 Cir., 217 F. 2d 6; *Local 205, United Electrical, Radio and Machine Workers of America (UE)* v. *General Elec. Co., supra*, 1 Cir., 233 F. 2d 85, affirmed *General Elec. Co.* v. *Local 205, United Electrical, Radio and Machine Workers of America (U. E.)*, 353 U. S. 547. Two reasons for this conclusion were stressed. First, Congress in enacting § 301 did not expressly withdraw the restrictions of the Norris-LaGuardia Act and such withdrawal cannot be implied, particularly since in other sections of the same Act, viz., §§ 101(h), 208(b), and 302(e), 29 U. S. C. §§ 160(h), 178(b), and 186(e), Congress expressly lifted the bar of the Norris-LaGuardia Act to vest certain injunction powers in the courts when the National Labor Relations Board initiated the court proceedings. Thus, see *Alcoa S. S. Co.* v. *McMahon, supra*, D. C. S. D. N. Y., 81 F. 2d 541, 543, affirmed 2 Cir., 173 F. 2d 567, certiorari denied 338 U. S. 821; and see also *McCarroll* v. *Los Angeles County District Council of Carpenters*, 315 P. 2d 322 (Cal. 1957). Second, it is an accepted canon of construction that repeals by implication are not favored, especially where the previous statute (the Norris-LaGuardia Act) is not stale or forgotten, but is a "significant and tremendously important piece of legislation which the Con-

[4] Thus the California Supreme Court, per Judge Traynor, recently concluded in a post-*Lincoln Mills* decision that § 301 did not repeal the Norris-LaGuardia Act. *McCarroll* v. *Los Angeles County District Council of Carpenters*, 315 P. 2d 322 (Cal. 1957).

gress evidently had specifically in mind when it came to enact the Labor Management Relations Act in 1947." *W. L. Mead, Inc.* v. *International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra*, 1 Cir., 217 F. 2d 6, 9.

Bull maintains that these cases are distinguishable because neither involved a no-strike clause in a collective bargaining agreement. But this does not follow. The presence of the clause might make it easier to find a breach by a strike, but it can have no effect on the problem of statutory construction. The cases cited above involved strikes which allegedly breached collective bargaining agreements, and the recitals of legislative history therein contained are relevant to our problem here.

Bull contends that these authorities are in error. It maintains that the legislative history of § 301, especially as quoted in *Lincoln Mills,* requires the conclusion that Congress intended to repeal the Norris-LaGuardia Act to the extent that federal courts do have jurisdiction to enjoin violations of agreements not to strike. In that case, 353 U. S. 448, 452-456, Justice Douglas quotes passages from Senate and House Reports indicating that Congress intended to make collective bargaining agreements enforceable on unions as well as employers. Bull finds other congressional statements to the same effect. These statements, however, shed little light on how these agreements are to be enforced; and each is consistent with an interpretation that Congress intended merely to provide employers with a monetary recovery for a union's breach of a no-strike agreement and to impose certain sanctions against employees such as loss of status. Even though the Court found that an agreement to arbitrate is the *quid pro quo* for an agreement not to strike, this does not mean that because the former is specifically enforceable the latter is also. The Court found statements of congressional policy favoring the specific performance of arbitration agreements. Here we have a significant statute opposed to enjoining peaceful strikes.

Bull argues that both Houses agreed initially to allow federal courts to enjoin breaches of collective bargaining agreements. The House did it by including in its version of § 301 the following passage:

> "(e) In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' shall not have any application in respect of either party."

The Senate did it by making violations of collective bargaining agreements unfair labor practices under § 8(b)(5), 29 U. S. C. § 158(b)(5), and empowering the National Labor Relations Board to seek injunctions to restrain unfair labor practices free from the prohibitions of the Norris-LaGuardia Act. Both provisions were eliminated in conference. Bull holds it unrealistic to believe that the conference deleted something on which both Houses previously had agreed. It contends that the difference in method was resolved by leaving the enforcement of collective bargaining agreements to the courts. It points to the following passage in the House Conference Report to support this contention:

> "The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Rep. No. 510, 80th Cong. 1st Sess. 41-42.

Bull asserts that the phrase "usual processes of the law" comprehends the injunctive relief which both Houses had

separately approved, and thereby indicates that Congress intended to grant jurisdiction to enjoin breaches of collective bargaining contracts, including strikes.

We do not find this analysis persuasive. First, the phrase "usual processes of the law" seems to refer to processes in force when the Act was passed. At the time the Taft-Hartley Act was passed federal courts had no power to enjoin peaceful strikes. Second, conference committees may and sometimes do change statutory provisos agreed upon earlier by both Houses. An example is cited in *Lincoln Mills,* 353 U. S. 448, 452, where the Court points out that both Houses initially provided that failure to abide by an agreement to arbitrate would be an unfair labor practice. This was dropped by the conference. Finally, the House Conference Report does not indicate why the conference dropped the House provision making the Norris-LaGuardia Act inapplicable to suits brought under § 301. The Report makes it clear that the provision was dropped, however, for it states:

> "Section 302(e) of the House bill [the House's original form of § 301] made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement." H. R. Rep. No. 510, 80th Cong., 1st Sess. 66.

The Report then goes on to say that the provision remains only in § 301(e), which relates to the determination of the question of agency. If the House provision stayed in the bill, the trial court undoubtedly would have had jurisdiction to enjoin the strike. But it was deleted without explanation, thus supporting the conclusion that Congress intended the Norris-LaGuardia Act to be applicable to suits brought under § 301.

The mandate of § 4 of the Norris-LaGuardia Act has been an expression of national policy for many years. If

this policy is to be changed it should be changed by Congress, and not by judicial legislation or inventiveness. It is our conclusion that Congress did not repeal § 4 of the Norris-LaGuardia Act by the enactment of § 301 of the Taft-Hartley Act. Under these circumstances the injunction order must be set aside.

Order reversed; action remanded for proceedings by the district court consistent with this opinion.

IV. Court of Appeals Opinion—Officers' Case (R. 129a-141a):

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 166—October Term, 1957.

(Argued October 28, 1957 Decided November 21, 1957.)

Docket No. 24874

A. H. BULL STEAMSHIP CO.,
Plaintiff-Appellee,

v.

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO,
Defendants-Appellants.

Before:

CLARK, *Chief Judge,* and
LUMBARD and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

National Marine Engineers' Beneficial Association, AFL-CIO and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO appeal from the grant of an injunction, *pendente lite,* restraining them from continuing peaceful strikes claimed to be in violation of their collective bargaining agreements with plaintiff, A. H. Bull Steamship Co. Reversed and remanded.

CLARK, *Chief Judge:*

A. H. Bull Steamship Co. brought suit below against the defendant unions seeking injunctive relief and damages for alleged breaches of collective bargaining agreements between plaintiff and each defendant. Bull alleged that the court had jurisdiction of the action as a case arising under § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, and by reason of the diversity of citizenship of the parties. At the outset of the action Bull moved for an injunction *pendente lite* restraining the unions from continuing peaceful strikes then in progress and requiring them to furnish plaintiff with qualified licensed officers. These strikes and defendants' failure to provide personnel constitute the alleged breaches of contract. The defendants moved to dismiss the action for lack of jurisdiction. The trial court heard the motions on affidavits and briefs, and determined that Bull's allegations of jurisdiction raised a substantial federal question. It denied defendants' motions and issued an extensive injunction *pendente lite.*[1] Both unions appeal

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[1] The main provisions of the injnction are contained in the following paragraphs:

> "Ordered that, effective October 21, 1957 at 5:00 P. M. Eastern Daylight Saving Time, defendants National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, their officers, agents, members, servants, employees, attorneys, and all persons in active concert or participation with them who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking or inciting, causing, inducing, or, in any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. H. Bull Steamship Co., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is
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> "Further Ordered that each of said defendants specifically perform its respective agreement to furnish the plaintiff with capable, competent and physically fit licensed

(Footnote continued on next page)

from the orders and contend that the court had no jurisdiction to issue the preliminary injunction.

The facts are largely undisputed. Bull, a Delaware corporation, is an operator of ships engaged in interstate and foreign commerce. National Marine Engineers' Beneficial Association, AFL-CIO (MEBA), an unincorporated association, represents licensed engineering officers aboard Bull's ships. International Organization of Masters, Mates and Pilots, AFL-CIO (MM&P), a New York membership corporation, represents licensed deck officers, other than masters, aboard these ships. Bull and MEBA entered into a collective bargaining agreement on June 18, 1955, which will expire on June 15, 1958. Bull and MM&P entered into a similar agreement on July 1, 1955, which runs until September 30, 1958. Both agreements provide that "[t]here shall be no strikes, lockouts, or stoppages of work during the period of this agreement." Both agreements also provide for wage reviews after the first anniversary dates of the agreements. After the first anniversary dates each defendant notified Bull that it wished to renegotiate wages. Negotiations took place, but were unsuccessful; and on August 19, 1957, both unions called peaceful strikes to enforce their demands. The peaceful strikes continued until the trial court issued its order. The parties disagree whether or not these strikes constitute breaches of the contracts, the controversy mainly concerning whether or not the no-strike clauses are applicable to the wage-reopening clauses. Ex-

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engineering or deck officers when and where they are required and of the ratings needed to fill vacancies necessitating the employment of such Licensed Personnel in ample time to prevent any delay in the scheduled departure of any vessel covered by said agreements; and it is

"Further Ordered that each of said defendants shall, so long as this Order remains in effect, promptly clear, validate or otherwise certify for employment aboard plaintiff's said vessels such qualified licensed officers who are members of the defendants' Unions as plaintiff may, from time to time, require."

cept to the limited extent discussed below, we find it unnecessary to ascertain whether or not the strikes actually constituted breaches of the contracts, since, even if they did, the trial court exceeded its jurisdiction in issuing the injunction.

Our recent decision in *A. H. Bull Steamship Co.* v. *Seafarers' International Union of North America*, 2 Cir., Nov. 21, 1957 (practically a companion case to this one) is in nearly all respects dispositive of this case. For, as we explain below, here also the issuance of an injunction is forbidden by the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.* Before reaching that point, however, we must examine the trial court's assumption of jurisdiction to issue the preliminary injunction.

Bull alleged in its complaint that the trial court had jurisdiction of the action as a case arising under § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, and by reason of the diversity of citizenship of the parties. We first address ourselves to these allegations as they concern MEBA. MEBA is an unincorporated association, and all of its members must be citizens of states other than Delaware for diversity of citizenship to exist between it and Bull. *Levering & Garrigues Co.* v. *Morrin*, 2 Cir., 61 F. 2d 115, affirmed 289 U. S. 103; *Hettenbaugh* v. *Airline Pilots Ass'n International*, 5 Cir., 189 F. 2d 319. But the trial court did not premise its jurisdiction to issue the injunction on diversity grounds, for it found evidence that members of MEBA reside in the State of Delaware. Rather, it held that Bull's complaint presented a substantial question of federal jurisdiction under § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, which it could not decide until assuming jurisdiction over the controversy.

The substantial question involves an interpretation of § 301(a). That section provides:

> "Suits for violations of contracts between an employer and a labor organization representing em-

ployees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

MEBA contends that its collective bargaining contract with Bull is not a "contract between an employer and a labor organization representing employees," and thus § 301 does not give the district court jurisdiction to entertain the action. The Union maintains that all its members employed by Bull are "supervisors" and not "employees" as defined in the Act.[2] Moreover, it contends that it is not a

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[2] The Act, 29 U. S. C. § 152, defines "employees" and "supervisors" as follows:

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

"labor organization" as defined in the Act, because it does not represent statutory "employees."[3] If MEBA's factual allegations are correct, § 301 by its own terms is inapplicable to this action.

The substantial question thus resolves itself into one of fact: Are the members of MEBA covered by the collective bargaining contract with Bull "supervisors" within the definitions of the Act? If they are "supervisors," then MEBA is not a "labor organization representing employees" for the purposes of this action. This result follows even if some members of MEBA outside of this bargaining unit are "employees." Section 2(5) of the Act, 29 U. S. C. § 152(5), defines a "labor organization" as "any organization * * * in which employees participate and which exists for the purpose * * * of dealing with employers concerning * * * conditions of work." In order to effectuate Congress' avowed intention to remove supervisors from the protections of the National Labor Relations Act,[4] this definition must be interpreted to mean an organization of "employees" covered by the collective bargaining agreement in question and which exists for the purpose of dealing with *their* employer. Otherwise individuals excluded by the Act could join unions which represent some "employees" and gain the protections of the Act. Thus if MEBA were classified as a "labor organization" for purposes of this action simply because some of its members who are not within this bargaining unit are statutory "employees," then supervisors could gain the protections of

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[3] The Act, 29 U. S. C. § 152(5), defines a "labor organization" as follows:

> "(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[4] See H. R. Rep. No. 245, 80th Cong., 1st Sess. 8, 13, 15, 17; Sen. Rep. No. 105, 80th Cong., 1st Sess. 3-5, 14.

the Act by joining either vertically integrated unions or unions which, in some parts of the country, represent non-supervisory personnel. This result was not intended by Congress.[5]

The trial court had extensive evidence before it on this question of fact. This evidence included affidavits of MEBA officials testifying that MEBA's members are supervisors and Bull's allegations in the state court proceeding that "[T]he classifications of persons represented by the MM&P and MEBA being supervisory personnel, the said picketing is not the result of a labor dispute as that term is defined in the Labor Management Relations Act of 1947, as amended." In addition, as discussed below, the trial court held the prohibitions of the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.*, inapplicable to this case because it was a dispute between an employer and supervisors (not "employees"). It is difficult for us to see how MEBA's members can be "supervisors" for purposes of the Norris-LaGuardia Act, and "employees" for purposes of the Taft-Hartley Act of 1947.

The trial court nevertheless decided to defer its factual determination of the jurisdictional issue until another time. It said:

> "The plaintiff claims that in various prior proceedings the defendant MEBA made admissions that it was a 'labor organization,' while, on the other hand, the said defendant challenges those statements or their effect and alleges that the individuals are 'supervisors,' within the meaning of the Act. As to the present application, it is not necessary to adjudicate these issues, other than to find, as this Court does find that the plaintiff presents a substantial Federal question and that this Court can decide the matter only after it has assumed jurisdiction over the controversy. The complaint herein alleges the violation of a single right, the right to have its agreement per-

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[5] H. R. Rep. No. 245, 80th Cong., 1st Sess. 15; Sen. Rep. No. 105, 80th Cong., 1st Sess. 3-4.

formed and a single claim for relief. Under these circumstances, the Court assumes jurisdiction of the action. *Strachman* v. *Palmer*, 177 F. 2d 427; *Hurn* v. *Oursler*, 289 U. S. 238 and *Brown* v. *Haldale Estates, Inc.*, 151 F. Supp. 118."

Hurn v. *Oursler*, 289 U. S. 238, and *Strachman* v. *Palmer*, 1 Cir., 177 F. 2d 427, 12 A. L. R. 2d 687, involve the doctrine of "pendent jurisdiction." Those cases hold that, where a federal court in disposing of a federal ground for relief hears evidence concerning the merits of a similar non-federal ground not otherwise subject to its jurisdiction, the court may dispose of the non-federal grounds. The doctrine finds its justification in avoiding wasteful relitigation of essentially the same issues, thereby serving the convenience of both the parties and the courts. But there is no such saving where, as here, there has been no trial on the merits and the doctrine is resorted to as a means of drawing wide areas of state law into federal cognizance for the issuance of labor injunctions on affidavits, contrary to federal principles. Although Bull argues for just such an extension of federal jurisdiction, it must be said that the trial court (beyond citing the two cases as above) never goes so far and nowhere indicates that it issued the preliminary injunction on some separate state ground supporting the relief. It only goes so far as to hold that where a breach of contract exists it may enjoin the breach *pendente lite* and defer deciding questions of its jurisdiction until trial. But even this we hold to be stepping outside its authority.

Undoubtedly, in a proper nonlabor case, a federal court may issue a preliminary injunction pending its determination of a substantial question of federal jurisdiction of the action. If this were not so a court would be powerless to maintain the *status quo* in a proper case due solely to defendant's attack on its jurisdiction. But substantial probability that the court will find a basis for federal jurisdiction, like the probability of a plaintiff's final success on the merits, is a crucial element necessary to justify

the issuance of an injunction *pendente lite*.[6] Here (postponing for a moment any consideration of the prohibitions of the Norris-LaGuardia Act) it appears quite likely that the court below has no jurisdiction under § 301 of the Taft-Hartley Act, 29 U. S. C. § 185, for the supervisory status of the MEBA employees of Bull is well established in the pleadings, affidavits, and briefs below. And where the probability of jurisdiction is doubtful, the only justification for issuing the preliminary injunction is that Bull will suffer irreparable harm from a maintenance of the *status quo* during the period necessary to determine the jurisdictional question which far outweighs the possible harm to MEBA and the expressed public policy forbidding federal courts to issue labor injunctions. This possibility is not shown here. In fact Bull's delay in seeking this relief controverts the probability of irreparable harm during the few days it might take the trial court to resolve the jurisdictional question.

The foregoing discussion applies in the case of MM&P to the extent that the trial court rested the injunction against it on the probability of jurisdiction under § 301. Bull now strives to sustain the injunction on state grounds. But since we hold that the Norris-LaGuardia Act prohibited the issuance of this injunction we shall not here comment on the propriety of applying state substantive rules to this controversy if jurisdiction is rested on the diverse citizenship of Bull and MM&P.[7]

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[6] *Hall Signal Co.* v. *General R. Signal Co.*, 2 Cir., 153 F. 907; *Nadya, Inc.* v. *Majestic Metal Specialties*, D. C. S. D. N. Y., 127 F. Supp. 467.

[7] If there is a paramount federal law governing collective bargaining agreements between employers and employees in interstate commerce, as Justice Douglas seems to forecast in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, then it will control, whatever the ground of jurisdiction, whether diversity of citizenship, pendent jurisdiction, or federal question. See *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 2 Cir., 234 F. 2d 538, 540 n. 1, 545-546, citing cases. [Judges Lumbard and Moore think it unnecessary to comment on this point at this time.]

The Norris-LaGuardia Act § 4, 29 U. S. C. § 104, prohibits the district court from issuing the injunction herein, for this is a case involving or growing out of a labor dispute as defined in § 13 of the Act, 29 U. S. C. § 113.[8] And Congress, in § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, did not impliedly repeal the Norris-LaGuardia Act to the extent that federal courts may now enjoin breaches of no-strike clauses in collective bargaining contracts. See our full discussion of this issue in *A. H. Bull Steamship Co. v. Seafarers' International Union of North America*, 2 Cir., Nov. 21, 1957.

Bull argues, and the court below held, that § 14(a) of the Taft-Hartley Act of 1947, 29 U. S. C. § 164(a), makes the Norris-LaGuardia Act inapplicable to cases involving

[8] 29 U. S. C. § 113 provides the following definitions:

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

employers and their supervisory employees. That section provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Section 14(a) makes no explicit reference to the Norris-LaGuardia Act. The clause "no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, national or local, relating to collective bargaining" contained in § 14(a) obviously does not relate to the Norris-LaGuardia Act, which prohibits federal injunctions in labor dispute cases, whether the dispute is between employers and employees, employers and employers, or employees and employees. 29 U. S. C. § 113(a). The legislative history of § 14(a) makes it clear that Congress intended the quoted clause to describe statutes which require employers to bargain collectively or be guilty of an unfair labor practice or its state law equivalent. The whole thrust of the supervisor provisions in the Taft-Hartley Act of 1947 was to remove supervisors from the operation of the National Labor Relations Act and return them "to the basis which they enjoyed before the passage of the Wagner Act."[9] And no mention is made in the statute, the

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[9] Sen. Rep. No. 105, 80th Cong., 1st Sess. 28, comments on § 14 as follows:

> "This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as

(Footnote continued on next page)

reports, or the congressional debate indicating that the Norris-LaGuardia Act was henceforth to be inapplicable to peaceful strikes by supervisory personnel. Moreover, contrary to Bull's contentions, denying the injunction on the basis of the Norris-LaGuardia Act does not compel Bull to bargain collectively with its supervisors in contradiction of the purpose of § 14(a). Bull can refuse to bargain, discharge the supervisors, and be guilty of no unfair labor practice or conduct proscribed by any other law, either national or local, relating to collective bargaining.

Order reversed; action remanded for proceedings by the district court consistent with this opinion.

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employees for the purpose of collective bargaining or organizational activity."

Senator Taft, explaining the status of supervisors under the Act, said during congressional debate:

"I shall try to summarize the changes which have been made. They are important. They make a substantial step forward toward the furnishing of equal bargaining power.

"The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." 93 Cong. Rec. 3952 (1947).

V. Court of Appeals Per Curiam—Both Cases (R. A 100-A 101; R. 161a-162a):

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued November 26, 1957—Decision November 27, 1957.)

[Same caption in each case.]

Before:

LUMBARD AND MOORE, *Circuit Judges.*

Motions by defendants-appellants for immediate issuance of mandate and cross-motion by plaintiff-appellee for stay pending application for certiorari. Denied.

PER CURIAM:

The motion of the defendant-appellant for the immediate issuance of the mandate of this Court, and the cross-motion of the plaintiff-appellee for a stay pending an application to the Supreme Court for a writ of certiorari are denied.

While we recognize the importance of the questions raised in this appeal, and also that the questions are not free from doubt, it seems to us that the Supreme Court or a Justice thereof should determine the matter of the continuance of the injunction beyond the usual period for the issuance of the mandate of this Court in view of the representations of plaintiff-appellee's counsel that their petition for certiorari is being prepared and will be presented promptly. Our denial of the plaintiff-appellee's motion for a stay is without prejudice to its seeking such a stay from the Supreme Court or a Justice thereof.

APPENDIX B

Statutory Provisions Involved

I. Labor Management Relations Act, 1947, Sections 1(b), 301 and 501; 29 U. S. C. §§ 141(b), 142(3), 185; 61 Stat. 136, 156, 161:

SEC. 1: *(Short Title and Declaration of Policy)*

. . . . .

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

SEC. 301: *(Suits by and against labor organizations):*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

* * * * *

SEC. 501. When used in this Act—

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

II. National Labor Relations Act, as amended by Labor Management Relations Act, Sections 1, 2(3), 2(5), 2(7), 2(11), 14(a); 29 U. S. C. §§ 151; 152(3), 152(5), 152(7), 152(11), 164(a); 61 Stat. 136-7, 151:

SEC. 1.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargain-

ing lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such com-

merce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act——

* * * * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning

grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

. . . . . .

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

. . . . . .

(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

• • • • •

SEC. 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

III. Norris-LaGuardia Act, Sections 1, 2, 4, 7, 13; 29 U. S. C. §§ 101, 102, 104, 107, 113; 47 Stat. 70-73:

SEC. 1:

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

SEC. 2:

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection: therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 4:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

. . . . .

(d) By all lawful means aiding any person participating or interested in any labor dispute who is

being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

. . . . .

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 7:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. . . .

SEC. 13:

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated or-

ganization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

APPENDIX C

Relevant Provisions of Collective Bargaining Agreements

I. "Freightship Agreement between Seafarers' International Union, Atlantic & Gulf District, AFL-CIO, and . . . A. H. Bull Steamship Co. . . ." effective October 15, 1956; Contract Expires September 30, 1958.

(PREAMBLE)

This agreement is entered into this third day of October, 1956 by and between the Seafarers International Union of North America, Atlantic and Gulf District, affiliated with the American Federation of Labor and Congress of Industrial Organizations, hereinafter referred to as the Union and the undersigned company, and any of its subsidiary companies, which may be formed to operate ships in the off-shore, coastwise, or intercoastal trade, hereinafter referred to as the Company and remains in effect until September 30, 1958, and shall continue from year to year thereafter, unless either party hereto shall give written notice to the other of its desire to amend or terminate same, which notice shall be given at least 60 days prior to the expiration date. After such notice has been given, specific proposals must then be submitted within 10 days and negotiations commenced at a time which is mutually agreed upon. If, during the 60 days period, the parties fail to agree with reference to such proposals, the parties may, by mutual consent, extend this agreement for a specific period beyond such expiration date for the continuance of negotiations. Applications by either party to open negotiations for changes in the wage scale or any monetary matters any time during the life of this agreement shall not be deemed cause for termination of this agreement. Monetary matters for the purpose of this section shall be the following: Wages, Overtime, Standby Rate. Longshore Rate, Tank Cleaning Rate, Explosives Handling Rate, Extra Meals Rate, Subsistence Rate and Room Allowance.

ARTICLE I: EMPLOYMENT

. . . . . .

SECTION 2. The Union agrees to furnish the Company with capable, competent, and physically fit persons when and where they are required, and of the ratings needed to fill vacancies necessitating the employment of Unlicensed Personnel, in ample time to prevent any delay in the scheduled departure of any vessel covered by this agreement. To assure maximum harmonious relations, and in order to obtain the best qualified employees with the least risk of a delay in the scheduled departure of any vessel covered by this agreement, the Company agrees to secure all Unlicensed Personnel through the Hiring Halls of the Union. . . .

ARTICLE II: GENERAL RULES

. . . . . .

SECTION 4. Stoppage of Work. There shall be no strikes, lockouts, or stoppages of work while the provisions of this agreement are in effect."

II. "Agreement between National Marine Engineers' Beneficial Association (Atlantic and Gulf Districts) and Atlantic and Gulf Dry Cargo and Passenger Vessel Companies and Agents" subscribed to by A. H. Bull Steamship Co. on June 18, 1955:

SECTION 1. *Recognition and Preference of Employment*—

—The Company recognizes the Association as the sole representative of its licensed engineers for the purpose of collective bargaining.

The Company agrees that when hiring any licensed engineer other than the Chief Engineer or a First Assistant Engineer, the employee shall be obtained through the offices of the Association; provided that engineers so named by the Association shall be qualified to fill the available positions, and further provided that the Company shall have the right to select men who the Company considers quali-

fied and satisfactory. Any engineer who has been discharged by a Company for cause in accordance with Section 4 of the agreement which has not been reversed by Section 2 of the agreement shall not be provided by the Association to the same Company for any available position. In case any person is rejected, the Association agrees to furnish a prompt replacement. . . .

. . . . . .

If the Company, with reasonable promptness after the occurrence of a vacancy, requests the Association to furnish a licensed engineer to fill such vacancy, and the Association is unable to do so in time to meet the requirements of the vessel, the Association shall immediately notify the Company which shall then be free to secure an engineer for this specific vacancy from any sources. However, preference shall be given to members of the Association in good standing, when available and qualified to fill the position.

. . . . . .

SECTION 2. *Grievance Procedure and Arbitration—*

(a) There shall be no strikes, lockouts or stoppages of work during the period of this agreement. All disputes relating to the interpretation or performance of this agreement which may arise between the parties hereto shall be determined by a Licensed Personnel Board consisting of two persons appointed by the Association and two persons appointed by the Committee for Companies and Agents. The aggrieved party shall submit a statement of its grievance to the Board in writing at a joint meeting which shall be held within forty-eight (48) hours from the time when the services of the Board are invoked (Saturdays, Sundays and holidays excluded), and the other party shall have an opportunity to submit a written reply thereto. The Board shall endeavor to adjust the dispute, and should it fail to satisfactorily adjust said dispute, it shall, within seventy-two (72) hours from the time of the beginning of the first meeting of the Board on the

matter, submit the dispute to an Arbitrator selected in accordance with the provisions of paragraph (b) hereof.

. . . . . .

SECTION 39.—*Effective date and Duration of Agreement*—

(a) This agreement shall be effective as of 12:01 A.M., June 16, 1955, on all ships at sea or in port.

(b) The contract shall continue until terminated by either party upon sixty (60) days' written notice to the other party provided that the contract shall in no event be terminated prior to June 15, 1958.

During the period of this agreement either party may request two wage reviews upon 60 days' prior written notice, provided, however, that no wage review shall be held prior to June 15, 1956. Said wage review may include general wages, overtime and penalty rates, the additional compensation for Chief and non-watchstanding assistant engineer and the rate for relief engineers.

III. "Atlantic and Gulf Coast Master Dry Cargo and Passenger Agreement between International Organization of Masters, Mates and Pilots, Inc. and Dry Cargo and Passenger Companies" subscribed to by A. H. Bull Steamship Co. on July 1, 1955.

SECTION 1—*Effective Date and Expiration Date of Agreement.*

(a) Except as hereinafter provided this agreement shall be effective on all ships at sea or in port June 16, 1955.

(b) The contract shall continue to and including September 30, 1958.

(c) During the life of the agreement either party may request two wage reviews upon 60 days prior written notice provided, however, that no wage review shall be held prior to September 30, 1956. Said wage review may include general wages, over-

time and penalty rates, and additional compensation for Masters and non-watchstanding Licensed Deck Officers and the rate for Relief Deck Officers."

SECTION 2—*Recognition and Employment Clause.*

. . . . . .

(h) The Employer agrees that when hiring any Licensed Deck Officers other than the Master or Chief Officer, the employee shall be obtained through the offices of the Organization; provided that the Licensed Deck Officers so provided by the Organization shall be qualified to fill the available positions, and further provided that the Employer shall have the right to select men whom the Employer considers qualified and satisfactory. . . .

. . . . . .

(m) All new employees below the rank of Chief Mate shall be obtained through the office of the Organization in the port where the vacancies occur, if available.

In the event such office is unable to provide such replacement with reasonable promptness the Employer shall have the right to secure such replacement through any office of the Organization in any other port.

SECTION 3—*Grievance Procedure and Arbitration.*

(a) There shall be no strikes, lockouts or stoppages of work during the period of this Agreement. All disputes relating to the interpretation or performance of this Agreement which may arise between the parties to this Agreement shall be determined by a Licensed Personnel Board consisting of two persons appointed by the Organization and two persons appointed by the Committee for Companies and Agents. The parties shall submit any such dispute for decision by the Board and they agree to be bound by the decision of a majority thereof. The Board shall agree to such rules for procedure as it may deem necessary.

. . . . . .

It is understood that in the event a picket line is established against any vessel, the Licensed Deck Officers of such vessel will report and perform all of their normal duties incidental to the security of the vessel, passengers and cargo, provided that no Licensed Deck Officer shall be required to work under conditions which may endanger his health or safety. The Organization undertakes to use its best efforts to obtain clearance for such purpose from the Union establishing the picket line.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 665

A. H. BULL STEAMSHIP CO.,
Petitioner,

against

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO,
Respondents.

A. H. BULL STEAMSHIP CO.,
Petitioner,

against

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, IN OPPOSITION

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225 Broadway,
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BRIEF FOR RESPONDENT, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, IN OPPOSITION

A. H. Bull Steamship Co. ("Bull Steamship" herein) has filed a single petition for writs of certiorari to review two judgments of the United States Court of Appeals for the Second Circuit filed November 21, 1957 (R. 142a)[1]

[1] Page references to the record or Appendix filed in the appeal of this case are followed with a lower case "a."

Opinion Below

Bull Steamship as plaintiff instituted a suit in the District Court for the Eastern District of New York against the two respondents, National Marine Engineers' Beneficial Association, AFL-CIO ("MEBA" herein) and the International Organization of Masters, Mates & Pilots, Inc. ("MM&P" herein). The District Court's opinion of October 17, 1957 is printed at pages 112a-120a of the Appendix below and in Appendix A, attached to the Petition, at pages 29-36.[2]

The opinion of the Court of Appeals of November 31, 1957 is printed in Appendix A, at pp. 49-60.

Jurisdiction

The jurisdictional requirements are adequately set forth in the Petition.

Petitioner has, however, joined in its petition another case[3] on the ground that there are questions common to both. This we dispute.

The opinion of the Court of Appeals disposes of the case against respondent *MEBA* without reaching any such common question. Any consolidation of the two cases is therefore opposed by MEBA.

Questions Presented

A) Can suits for violation of collective bargaining agreements made exclusively for "supervisory" personnel

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[2] References to Appendix A, B or C are to the Appendices attached to the Petition.

[3] Suit instituted by Bull Steamship in District Court against Seafarers' International Union, which was heard and decided independently both before the District Court and Court of Appeals. (Appendix A at pp. 21 *et seq.* and 37 *et seq.*

be brought under Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. Sec. 185 (Appendix B, at p. 62).

B) Where the Court of Appeals determines factually that the case presents a complete absence of any substantial federal question and finds a want of equity in Petitioner's position, does it have the judicial authority to reverse the District Court's temporary injunction order, restraining a strike and peaceful picketing in an admitted labor dispute.

Statutes Involved

The pertinent provisions of all relevant statutes are set forth in Appendix B, attached to the Petition, at pp. 62-70.

Statement of Case and Disposition Below

MEBA, an unincorporated labor union, entered into a collective bargaining agreement with Petitioner in June 1955 covering the licensed marine engineers employed aboard Petitioner's vessels (Appendix C, at pp. 72-74). This agreement expires June 15, 1958.

Pursuant to Section 39 of said Agreement, which provides for only two wage reviews during its three year term, MEBA on April 11, 1957 sent a notice to the Petitioner requesting such review. Two conferences, with offers and counter offers being rejected, resulted in an impasse, and MEBA advised Petitioner that under the circumstances it reserved the right to take such action as it deemed necessary to protect the interests of its members who were employed by Petitioner (26a-27a).

There is not a word in the record that Petitioner endeavored at any time to seek mediation of its dispute with MEBA. On the other hand, MEBA specifically contra-

dicted the claim of Petitioner that any legitimate offer of arbitration of the wage issue had been made (31a).

On August 27, 1957, MEBA initiated its own picketing conducted exclusively in behalf of its independent labor dispute with Petitioner (27a).

The MEBA contends that the parties to the Agreement clearly understood and the various provisions of the Agreements so indicate that (1) such wage review (contained in Section 39) was not subject to the arbitration clause of the Agreement (contained in Section 2 titled "Grievance Procedure and Arbitration") which governs the adjustment of certain type grievances; (2) the "no strike" clause contained in Section 2 covering "Grievance Procedure and Arbitration" was limited to the grievances which can be taken up thereunder; and (3) in the absence of available compulsory arbitration for such wage review, the MEBA had a right to strike, otherwise the wage review would be meaningless (28a-32a). Therefore, a strike after an impasse had been reached on the wage review, was not a violation of the Agreement. See *National Labor Relations Board* v. *Lion Oil*, 352 U. S. 282.

Petitioner, on August 27, 1957 brought suit against MEBA in the Supreme Court of the State of New York, claiming a breach of the collective bargaining agreement, because of MEBA's strike and picketing, and requested an injunction to restrain the same. A motion for a temporary injunction was denied on September 3, 1957 and the complaint dismissed with the Court holding that a "labor dispute" was involved and therefore governed by New York's little Norris-LaGuardia Act (39a-49a).

Leave to amend was granted and a second amended complaint was filed in the State court on September 9, 1957 and another motion made for a temporary injunction. The Court again found on September 19, 1957 that a "labor dispute" was involved, thereby governed by the State's little Norris-LaGuardia Act and set the case down for a

hearing before a referee to hear and report to the Court (50a-58a). This proceeding has not been processed by Petitioner but has been permitted to lie dormant.

It was not until October 7, 1957 that the suit was brought in the District Court against the MEBA, alleging breach of the collective bargaining agreement because of the strike and picketing and in addition to a request for declarative and damage relief, sought precisely the same injunction which had been denied in the State court (2a-8a). Cf. *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511.

A motion for a temporary injunction was heard by the District Court on the basis of the complaint and supporting and opposing affidavits. There was no trial or hearing of witnesses.

Before the District Court, MEBA took the following position supported by several affidavits:

> (1) The District Court lacked jurisdiction to entertain the suit against MEBA since there was no diversity of citizenship between the parties (34a), and the collective bargaining agreement covering only licensed marine engineers, who are "supervisors," was not within the purview of Section 301 of the Labor Management Relations Act of 1947 (33a, 53a, 54a).
>
> (2) The complaint failed to state a cause of action in that the essence of plaintiff's case is that MEBA by its picketing has committed a breach of its collective bargaining agreement; whereas in fact MEBA has not committed any such breach.
>
> Certainly, a sufficiently serious conflict on interpretation as to whether a breach had occurred, had been presented in the moving and opposing affidavits to justify a full hearing with opportunity for witnesses before the extraordinary relief of a temporary injunction be granted.

(3) Even if it be assumed, that MEBA has committed a breach of contract and that the court has jurisdiction, nevertheless the court could not grant the relief sought by way of an injunction restraining peaceful picketing. To do so would be in direct violation of the provisions of the Norris-LaGuardia Act.

(4) Proceeding should be stayed because of pendency of prior State court action.

The District Court, in spite of what we considered a formidable array of legal obstacles, issued a temporary injunction enjoining the strike and peaceful picketing by MEBA (121a-122a).

On the issue of federal jurisdiction, the District Court conceded that there probably was no diversity of citizenship between Bull Steamship and MEBA since MEBA had members who reside in Delaware, the state of incorporation of the Petitioner (115a). With respect to the second alleged ground for federal jurisdiction, namely, Section 301 of the Labor Management Relations Act, even though the record clearly established, without contest, that the personnel covered by MEBA's agreement were "supervisors" and therefore not "employees" as defined by that Act, the Court simply concluded that ". . . it is not necessary to adjudicate these issues, other than to find, as this Court does find that the plaintiff presents a substantial Federal question and that this Court can decide the matter only after it has assumed jurisdiction over the controversy. The complaint herein alleges the violation of a single right, the right to have its agreement performed and a single claim for relief. Under these circumstances, the Court assumes jurisdiction of the action. *Strachman* v. *Palmer*, 177 F. 2d 427; *Huron* v. *Ousler*, 289 U. S. 238 and *Brown* v. *Haldale Estates, Inc.*, 151 Supp. 118" (116a).

The District Court thereupon addressed itself to the question of the alleged breach of contract and though recognizing that an unresolved wage issue was the cause of an admitted labor dispute and the resultant strike and picket-

ing, relied upon the no strike clause in the agreement and held: "In neither agreement (one with MEBA and the other with the MM&P) is the no strike clause qualified by the wage reopening clause. The defendants, by the terms of the agreements, were not entitled to strike by reason of the collapse of the wage negotiations, whatever the cause" (114a).

The District Court concluded that it could issue the injunction against peaceful picketing because Section 14(a) of the National Labor Relations Act, as amended (Appendix B, at p. 66), modified the Norris-LaGuardia Act, by excluding from its protection, unions representing "supervisors."

The Court of Appeals reversed and resolved the first Question, presented supra, by determining as a matter of statutory interpretation that under Section 301 of the Labor Management Relations Act (Appendix B, at p. 62), suits can be brought only for violations of collective bargaining agreements which cover "employees" as defined by Section 2(3) of the Act (Appendix B, at p. 65). And conversely, agreements covering exclusively "supervisors" are not within the purview of Section 301. Incidentally, while the District Court actually failed to pass on this issue, by implication, in finding it necessary to discuss whether the Agreement covered "supervisors," it apparently concurred with the statutory interpretation of the Court of Appeals.

The Court below thereupon sought to ascertain whether any substantial federal question had been presented in the suit against MEBA.

The Court of Appeals accepted the finding of the District Court as to the absence of diversity of citizenship with the comment: "But the trial court did not premise its jurisdiction to issue an injunction on diversity grounds, for it found evidence that members of MEBA reside in the State of Delaware" (Appendix A, at p. 52).

The Court below then addressed itself to the second alleged ground for federal jurisdiction, i.e., Section 301 of the Labor Management Relations Act. It held that "The substantial question of Federal jurisdiction thus resolves itself into one of fact: Are the members of MEBA covered by the collective bargaining contract with Bull 'supervisors' within the definitions of the Act" (Appendix A, at p. 54). On this issue of fact, the Court decided that ". . . the supervisory status of MEBA employees of Bull is well established in the pleadings, affidavits and briefs below" (Appendix A, at p. 57). In addition the Court pointed out ". . . as discussed below, the trial court held the prohibitions of the Norris-LaGuardia Act, 29 U. S. C. Sec. 101 *et seq.*, inapplicable to this case because it was a dispute between an employer and supervisors (not "employees"). It is difficult for us to see how MEBA's members can be 'supervisors' for the purposes of the Norris-LaGuardia Act and 'employees' for purposes of the Taft-Hartley Act of 1947" (Appendix A, at p. 55).

On the basis of the foregoing facts, the Court of Appeals determined that the Petitioner had not sustained its burden necessary to show a ". . . substantial probability that the Court will find a basis for federal jurisdiction (which) like the probability of a plaintiff's final success on the merits is a crucial element necessary to justify the issuance of an injunction pendente lite." And, in addition, it found the balance of equities did not favor the Petitioner (Appendix A, at p. 57). Accordingly, the Court responded affirmatively to the second Question, presented supra, by reversing the District Court's temporary injunction.

The Court of Appeals found it unnecessary, as far as MEBA is concerned, ". . . to ascertain whether or not the strikes actually constituted breaches of contracts . . ." (Appendix A, at p. 52); though the Court acknowledged that "The parties disagree whether or not these strikes constitute breaches of the contracts, the controversy merely

concerning whether or not the no strike clauses are applicable to the wage reopening clauses" (Appendix A, at p. 51).

Nor did the Court below, in the face of its determination on the first and second Questions, find it necessary to pass upon the question whether an injunction could issue against *MEBA's* peaceful picketing in the course of a labor dispute because of the Norris-LaGuardia Act; or whether such Act was modified by Section 301 of the Labor Management Relations Act or any other legislation directed against unions representing "supervisors."

It is submitted the rulings of the Court of Appeals are not in conflict with any decisions of other federal courts.

There are no considerations, we further submit, that demonstrate the importance of any question of federal law raised by this appeal which should be decided by this Court at the present stage of the litigation.

Reasons For Denying the Writ

A.

The Court of Appeals, in answering the first Question, that Section 301 of the Labor Management Relations Act is not applicable to collective bargaining agreements which cover "supervisors" exclusively, was clearly correct and in light of the specific provisions and legislative history such interpretation was the only possible decision to be made. This ruling does not present a conflict with any decision of other Federal Courts.[1] The ruling is so patently correct that no important question of federal law is presented which should be settled by this Court.

---

[1] Though the legislation has been in effect for more than 10 years, the present suit against MEBA is the first attempt to bring an agreement covering "supervisors" within the purview of Section 301.

The Court below reasoned that the clause "labor organization representing employees" contained in Section 301 of the Act (Appendix B, at p. 62) must necessarily be interpreted "to mean an organization of 'employees' covered by the collective bargaining agreement in question and which exists for the purpose of dealing with *their* employer" (Appendix A, at p. 54). Thus, it is immaterial whether MEBA has, as members, "employees" of other employers which might make it a "labor organization." *Labor Board* v. *Edward G. Budd Manufacturing Co.*, 169 F. 2d 571 (1948), cited by Petitioner, is therefore inapplicable rather than in conflict.

The term "employees" was then read in light of the definition contained in Section 2(3) of the Act which specifically excludes "supervisors" as defined in Section 2(11) of the Act (Appendix B, at pp. 63, 65, 66). Such interpretation was not contrary to any determination made by the District Court; actually by implication the District Court was in accord. There is no decision of any Federal court to the contrary.

Aside from the fact that Section 2 of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (Appendix B, p. 65) and Title V, Section 501 of the latter act (Appendix B, at p. 63) command that the term "employees" wherever used in the Acts be read in light of the definition provided, the Court of Appeals predicated such usage upon the legislative history that "The whole thrust of the supervisor provisions in the Taft-Hartley Act of 1947 was to remove supervisors from the operation of the National Labor Relations Act and return them to the basis which they enjoyed before the Wagner Act" and cited H.R. Rep. No. 245, 80th Cong. 1st Sess. 8, 13, 15, 17; Sen. Rep. No. 105, 80th Cong. 1st Sess. 3-5, 14. Also see 93 Cong. Rec. 80th Cong. 1 Sess., pp. 4566 and 5105. Thus, "supervisors" covered by collective bargaining

agreements may not receive any of the benefits of Section 301 of the Labor Management Relations Act, anymore than they can under any other section of the Act,[1] and equally so can not be subjected to its burdens. The District Court apparently agreed with such judicial interpretation when it stated: "Likewise, it is plain that the Congress intended that 'Supervisors' should not be governed by that Act (Labor Management Relations Act), or by any other national or local law . . ." (117a).

It is interesting that Petitioner fails to suggest or support any concrete alternative interpretation.

The two decisions from the Fifth Circuit cited by Petitioner are not in conflict in any sense. *W. T. Smith Lumber Co.* v. *NLRB*, 246 F. 2d 129 (1957) and *International Rice Milling Co.* v. *NLRB*, 183 F. 2d 21 (1951) reflect the Court's desire to avoid an interpretation of the section of the Act in question (not Section 301) which would have left innocent third parties, namely, railroads, open to secondary boycotts contrary to the legislative objective. But, in the present case, it was the clear-cut mandate of Congress relating to "supervisors" which was being adhered to. See Frankfurter, *Some Reflections on the Reading of the Statutes*, 47 Col. L. Rev. 527.

A case comparable to the present proceeding against MEBA is *Di Giorgio Fruit Corp.* v. *NLRB*, 191 F. 2d 642 (1951) cert. denied 342 U. S. 869, where the definitions of "employees" and "labor organizations" found in Section 2 of the National Labor Relations Act, as amended, were applied to Section 8 of the Act on the ground that the excluded class of workers, namely farm workers, was not entitled to the benefits of the Act and must be equally immune from its burdens.

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[1] See *Labor Board* v. *Edward G. Budd Manufacturing Co.*, 169 F. 2d 571 (1948) and *NLRB* v. *Inter City Advertising Co. of Charlotte*, 190 F. 2d 420 (1951) cert. denied 342 U. S. 908.

In *W. T. Smith Lumber* v. *NLRB*, *supra*, the Court specifically distinguished its special problem from that present in the *Di Giorgio Fruit Corp.* case and did not question the correctness of the latter decision. See its footnote 7 at page 131.

Petitioner points to the anomalous result if the term "employees" were to be inflexibly read in light of its statutory definition wherever used in the Act since this would exclude "supervisors" from Section 313 of the Federal Corrupt Practices Act 2 U. S. S. Sec. 251, which is amended by Section 304 of the Labor Management Relations Act. Petitioner observes "A more palpable affront to congressional intent can hardly be imagined." However, the legislative history of the Labor Management Relations Act discloses a more intelligent congressional understanding of its enactment than Petitioner is prepared to accord. See H.R. Conference Rep. No. 510, 80th Cong. 1st Sess. at p. 68, which specifically excludes the statutory definitions only from Section 313 of the Corrupt Practices Act with the comment:

> "Title V.
>
> Section 501 of the Senate amendment contained definition of terms used in Title II, III and IV. It should be noted that none of the terms defined, however, have any application to the amendments to Section 313 of the Federal Corrupt Practices Act since Section 313 of the Corrupt Practices Act is not a part of 'this Act.' "

The statutory interpretation by the Court of Appeals raises no constitutional issue, does not adversely affect the administration of the Act by the National Labor Relations Board; actually it is consistent with the view of the Board (see *Di Giorgio Fruit Corp.* v. *NLRB*, *supra*) and does not involve any far-reaching or troublesome issue.

B.

The Court of Appeals in reversing the District Court's temporary injunction order restraining a strike and peaceful picketing in a labor dispute when it found ". . . the probability of jurisdiction . . . doubtful . . ." and a want of equity in position of Petitioner, simply invoked accepted equity doctrine. Such ruling certainly does not present a decision in conflict with any decision of other Federal courts. And it is difficult to see any important question of federal law involved in such determination to be settled by this Court.

The Court below determined that "The substantial question thus resolves itself into one of fact: . . ." It thereupon probed the entire record to ascertain whether the claim of a substantial federal question was plainly without color of merit. See *Land* v. *Dollar*, 330 U. S. 731, 736 footnote 4.

First, there is a finding that no diversity of citizenship was established between MEBA, an unincorporated association and the Petitioner (Appendix A, at p. 52). This eliminated one possible ground for federal jurisdiction. *Levering & Garrigues* v. *Morrin*, 61 F. 2d 115 (1932) affirmed 289 U. S. 103.

Second, there is a finding, that ". . . the supervisory status of the MEBA employees of Bull is well established in the pleadings, affidavits and briefs below" (Appendix A, at p. 57).

The Court of Appeals thereupon concluded that the Petitioner had not sustained its burden to show a ". . . substantial probability that the Court will find a basis for federal jurisdiction (which) like the probability of a plaintiff's final success on the merits, is a crucial element necessary to justify the issuance of an injunction *pendente lite*" (Appendix A, at p. 56). The Court proceeded to balance

the relative equities of the parties in light of the record and stated: "And where the probability of jurisduction is doubtful, the only justification for issuing the preliminary injunction is that Bull will suffer irreparable harm from a maintenance of the *status quo* during the period necessary to determine the jurisdictional question which far outweighs the possible harm to MEBA and the expressed public policy forbidding federal courts to issue labor injunctions. This possibility is not shown here. In fact Bull's delay in seeking this relief controverts the probability of irreparable harm during the few days it might take the trial court to resolve the jurisdictional question" (Appendix A, at p. 57).

This Court, we respectfully submit, should not grant a writ, at the stage of an interlocutory order, simply to review questions of fact (*Southern Power Company* v. *North Carolina Public Service Co. et al.*, 263 U. S. 508) or an exercise of equity discretion in the issuance or denial of a temporary injunction. *Meccano, Limited* v. *John Wanamaker*, 253 U. S. 136.

The Court of Appeals did not improperly limit or negate the doctrine of "pendant jurisdiction." Its opinion clearly discloses a recognition that such doctrine may apply to the issuance of a temporary injunction. "If this were not so a court would be powerless to maintain the *status quo* in a proper case due solely to defendant's attack on its jurisdiction" (Appendix A, at p. 56). The Court's special concern for labor cases does not reflect an exclusion of such situations from the rule of "pendant jurisdiction" but rather a proper recognition of the express national policy framed by the Norris-LaGuardia Act. Finally, the Court of Appeals actually questioned whether the lower court had applied the doctrine of "pendant jurisdiction" by observing that the District Court "never goes so far and nowhere indicates that it issued the preliminary injunction on some separate state ground supporting the relief" (Appendix A, at p. 56).

There is no conflict with any of the cases cited by Petitioner invoking "pendant jurisdiction." In all such cases, regardless whether the Court was granting preliminary or final relief, it was a *sine qua non* that a substantial federal question be presented. For example, in *Louisville & Nashville RR Co.* v. *Garrett*, 231 U. S. 298, cited by Petitioner, this Court specifically justified the issuance of a temporary injunction by commenting:

> "The reference undoubtedly is to an asserted conflict with the Federal Constitution and the question of unconstitutionality in this sense must be a substantial one."

The Court of Appeals did not direct the dismissal of the complaint against MEBA. It specifically contemplated a trial before the District Court. The Court below confined its decision to the traditional and well established equity rules applicable to the issuance of a temporary injunction and particularly in a labor dispute. See *Hall Signal Co.* v. *General R. Signal Co.*, 153 F. 907 (1907) cited in Opinion below.

It is highly doubtful, in any event, whether Petitioner can bring itself within the doctrine of "pendant jurisdiction" which presupposes a complaint setting forth a single claim for relief but asserting two distinct grounds, one federal and one non federal, as a basis for the relief demanded. Petitioner's claim is predicated upon a breach of collective bargaining agreement in an industry affecting commerce. Under the rule of *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, the federal and state grounds for relief must necessarily be mutually exclusive. See footnote 7 of Court of Appeals opinion (Appendix A, at p. 57).

C.

If the mandate of the Court of Appeals were to issue, further proceedings before the District Court may eliminate the single question of statutory interpretation presented at this stage of the litigation.

The District Court, after a full trial, may determine that the facts do not present any breach of contract. In such event, the complaint would be dismissed and an appeal would be limited to substantive questions of contract interpretation.

It is this very uncertainty which normally prompts this Court to deny petitions for writs in cases involving an interlocutory order. *American Construction Co. v. Jacksonville T & K Ry Co.*, 148 U. S. 372, 384. While contrary action has been taken by this Court as in the cases cited by Petitioner, in each such instance, however, a special factor justified the writ. In *Bakery Drivers Union* v. *Wagshal*, 338 U. S. 437 (the decision presented a conflict among cases); *Larson* v. *Domestic & Foreign Group*, 337 U. S. 682 (a far-reaching important question such as the immunity of United States from suit); and *Deckert* v. *Independence Shares, Inc.*, 311 U. S. 282 (A troublesome question affecting the administration of a Federal statute). But none of these factors are present in our proceeding.

Further, the denial of the writ would rectify the inequitable condition in which MEBA has been placed. The Court of Appeals after weighing the respective equities of the parties reversed the injunction order. That Court refused to grant a stay of its mandate (R. 160a-161a). A stay was issued by Mr. Justice Harlan. The temporary injunction restraining MEBA's strike and peaceful picketing continues in effect until final disposition of the Petition is made by this Court. Beyond the intervening harm to MEBA, as described in the opinion of the Court below,

which has been considerable, the continuation of the temporary injunction may well result in the full destruction of MEBA's rights in the matter since the collective bargaining agreement between the parties expires June 15, 1958. See Dissenting Opinion of Justice Douglas in *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511, 526.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari in the suit against respondent MEBA should be denied.

Respectfully submitted,

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December 31, 1957.

Office - Supreme Court, U.S.
FILED
JAN 6 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 665

A. H. BULL STEAMSHIP CO.,

Petitioner,

—against—

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO,

Respondent.

A. H. BULL STEAMSHIP CO.,

Petitioner,

—against—

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO,

Respondents.

BRIEF FOR RESPONDENT, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO, IN OPPOSITION

SEYMOUR W. MILLER
Counsel for Respondent, Seafarers' International Union of North America, Atlantic and Gulf District, AFL-CIO

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A. H. BULL STEAMSHIP CO.,

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BRIEF FOR RESPONDENT, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL-CIO, IN OPPOSITION

Opinions Below

The Court of Appeals' opinion in petitioner's ("Bull") case against respondent ("SIU") has not as yet been officially reported. The opinion of the District Court is reported at 155 F. Supp. 739, is printed at pages A 59-A 66 of the Joint Appendix submitted below, which Appendix is a

part of the Court of Appeals record certified to this Court, and is also printed at pages 21-28 of Appendix A, annexed to the petition. The opinion of the Court of Appeals is printed at pages 37-48 of Appendix A, annexed to the petition.[1]

Jurisdiction

The Court of Appeals entered its judgment on November 21, 1957. Bull did not move for a rehearing.

This Court's jurisdiction to review the judgment of the Court of Appeals is invoked under 28 U. S. C., Section 1254(1). The judgment sought to be reviewed is wholly interlocutory. It reverses, on the basis of a unanimous Court of Appeals opinion, a temporary injunction issued by the District Court, enjoining, *pendente lite*, a strike and peaceful picketing in the course of a labor dispute.[2]

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[1] Hereinafter, in order to distinguish among the various appendices and the unprinted portion of the certified record, the following procedure will be followed: All references to pages in the Joint Appendix below will be preceded by the letters JA. All references to pages in the Appendix annexed to the petition will be preceded by the letters PA. All references to pages in the portion of the unprinted certified record will be preceded by the letters RA, to conform to the code utilized by the petitioner. All references to pages in the Appendix annexed to this brief in opposition will be preceded by the letters SA.

[2] SIU objects to the petitioner's combining the SIU case and the Officers' case. These are two separate cases, separately commenced, predicated on different contracts, and involving different issues totally unrelated to the issues here. The combining of the cases is both prejudicial and confusing, not to mention the difficulty involved in extracting from one continuous presentation those features applicable solely to the SIU case.

The mandate of the Court of Appeals was stayed, pending final disposition of the petition, by the order of Mr. Justice Harlan, entered on December 5, 1957. There is presently pending a motion before the Court, seeking a review and reversal of the said stay on the grounds, *inter alia*, that the stay may well destroy all of SIU's rights in the premises, notwithstanding the legality of its actions.

Question Presented

The parties hereto are the employer and union parties to a collective bargaining agreement. Pursuant to a wage reopening, negotiations were had and an impasse reached, whereupon a peaceful strike and picketing ensued. The agreement contains a no-strike clause, but the parties differ as to its scope and applicability. The employer brought suit under Sec. 301 of the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 185), claiming the strike and picketing constituted a breach of the collective bargaining agreement, and seeking, *inter alia,* an injunction against the said breach. The District Court granted an injunction, *pendente lite,* which the Court of Appeals unanimously reversed.

The question is, does a Federal Court have jurisdiction, in such suit, to enjoin the said strike and picketing, notwithstanding the Norris-LaGuardia Act (29 U. S. C., Secs. 101, *et seq.*)?

Statutes Involved

The statutes involved are Sections 301(a) and 301(e), of the Labor Management Relations Act of 1947, as amended, 29 U. S. C., Sections 185(a) and (e), respectively; and Sections 1, 2, 4, 6, 7, 8, and 13 of the Norris-LaGuardia Act, 29 U. S. C., Sections 101, 102, 104, 106, 107, 108, and 113, respectively. All of these statutes will be found at PA 62-70, except that Section 301(e) of the Labor Management Relations Act and Sections 6 and 8 of the Norris-LaGuardia Act are printed at SA 1a.

Statement of the Case and Disposition Below

Bull is a deep-sea ship operator, engaged in intercoastal and foreign commerce. SIU is a labor organization, the

collective bargaining representative of the unlicensed seamen aboard Bull's vessels (JA 2). The latest agreement between the parties was signed on or about October 2, 1956, which agreement expires September 30, 1958.[3] SIU has had collective bargaining agreements with Bull since 1940 (JA 9), which agreements contained—as they still do—a grievance adjustment-arbitration clause (Article II, Section 3, of the Agreement, JA 22). By the terms thereof, if grievances cannot be settled aboard ship, they go to a Port Committee consisting of 3 representatives from both the Union and the company. Failing agreement on the disposition of the grievance, the Port Committee is required to select an arbitrator, whose decision shall be final and binding. Failing agreement on this selection, it is left to a United States District Judge (JA 22). This method of resolving grievances constitutes the only arbitration procedure set up in the entire agreement, apart from the patently inapplicable provisions in Article I, designed to resolve disagreements among members of the Seafarers Appeals Board, a joint management-Union Board granted jurisdiction, by contract, over the seniority and shipping rights of individual seamen. Thus, no arbitration procedure was either intended or established to resolve impasses on wage reopenings calculated to change the monetary provisions of the agreement. The no-strike clause referred to by Bull follows immediately after the clause setting out the grievance adjustment-arbitration procedure just referred to.

On June 17, 1957, notice was served by SIU that it desired to reopen for wage adjustments. As both the District

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[3] Petitioner has handed up a certified copy of this agreement as part of the certified record (Petition for Certiorari, page 4). Respondent has handed up to this Court nine additional copies of this agreement. Pertinent portions of this agreement, not set forth in Appendix C of the petition, are set forth at SA 1b.

Court (PA 22) and the Court of Appeals (PA 39) found, negotiations ensued, but were unsuccessful. As a result, SIU instituted a peaceful strike and picketing, on August 19, 1957 (PA 22; PA 39).

Shortly after the commencement of the strike and picketing, Bull began an action against SIU in the Supreme Court of the State of New York, County of Kings, in which both an injunction pendente lite and a permanent injunction against the strike and picketing were sought, on the basis that SIU had breached its contract by virtue of the said strike and picketing (JA 37-40). The motion for a temporary injunction was denied and the complaint dismissed, with leave to amend, on the authority of New York's "little Norris-LaGuardia Act", C. P. A. 876-a (JA 41-43). Bull then amended its complaint in an attempt to at least nominally comply with the requirements of the latter statute, and reinstituted its motion for a temporary injunction, which was then referred to an Official Referee (JA 57-58). This decision actually came down September 19, 1957. Without waiting for this decision, however, Bull instituted, on September 16, 1957 (JA 7), an action in the United States District Court for the Eastern District of New York, seeking precisely the same relief on precisely the same alleged breach, albeit now under Sec. 301(a) of the Labor Management Relations Act of 1947 [Sec. 185(a) of 29 U. S. C.], and adding a prayer for damages and a declaratory judgment (JA 2-6).

In its moving affidavit (JA 8-15), Bull sought to establish that the no-strike clause covered an impasse on reopening for wages (JA 9-10), so that a strike in connection therewith amounted to a breach, and that the negotiations, strike, and picketing were conducted in bad faith, the real motive thereof being pressure on its sole stockholder, American

Coal Shipping, Inc. ("ACS"), with which SIU has a separate dispute (JA 10-12). It did not challenge the peacefulness of the strike and picketing. SIU replied (JA 18-55) that the reopening clause—demanded some seven years after the first contract containing the no-strike clause was entered into—was never intended, or considered by anyone (including all the other companies with whom it had negotiated the same clause at about the same time) to be limited thereby upon impasse (JA 28), since it would thus amount to nothing more than the toothless "right" to talk, that both as a matter of fact and, indeed, as evidenced by the very juxtaposition of the no-strike clause, it was intended to apply solely to shipboard grievances for there, a *quid pro quo*—arbitration—had been agreed to (JA 23), and that the dispute, albeit indirectly affected by SIU's troubles with ACS, was confined solely to Bull (JA 24-26). Jurisdiction over the parties was not questioned. Dismissal, particularly of the injunctive aspects of the litigation, was sought, and a stay of all other proceedings was asked for, on the basis of the pending State Court action (JA 31-55).

The District Court, on papers and legal argument only, but without a hearing, found a breach of contract and granted an injunction, *pendente lite*, of "substantial scope" (PA 38), holding Norris-LaGuardia inapplicable in proceedings designed to enforce collective bargaining agreements (PA 24, JA 62), and citing this Court's decision in *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, as authorizing the issuance of an injunction in this case, although, with jurisdiction over the "person" of respondent not contested, why it needed *Lincoln Mills*, in the light of the claimed inapplicability of Norris-LaGuardia to contract enforcement proceedings, was not explained.

The District Court did not mention the State Court action, termed the charge of bad faith bargaining irrelevant "at this time" (PA 22), and disposed of the unbroken array of contrary precedents simply by ignoring them.

The Court of Appeals unanimously reversed. It expressly noted the said array of precedents (PA 40), and that the attempt to distinguish them on the grounds that none involved an express no-strike clause was a *non sequitur*, since all assumed the existence of a breach, no matter how more easily discernible by an express no-strike clause (PA 45). It emphasized that the *Lincoln Mills* case involved an arbitration agreement, the enforcement of which did not run afoul of the Norris-LaGuardia Act, while the present injunction falls squarely within the prohibited categories set out in Section 4 of that Act (PA 41-44). Thus, the Court reasoned, the issue was whether Norris-LaGuardia was impliedly repealed, *pro tanto*, by Sec. 301 of the Labor Management Relations Act, impliedly, because nowhere in Sec. 301 is there any express mention, much less repeal, of Norris-LaGuardia. In contradistinction to this, the Court noted that, where Congress contemplated the issuance of injunctions under the Labor Management Relations Act [29 U. S. C., Secs. 160(h), 178(b), and 186(e)], it expressly provided for the inapplicability of Norris-LaGuardia (PA 44). In this connection, it took special cognizance of the principle that accepted canons of construction do not favor the implied repeal of so significant an enactment as Norris-LaGuardia (PA 44-45). Finally, in exploring the history of Sec. 301, the Court found no evidence of an intent to repeal Norris-LaGuardia, *pro tanto*. Rather, it found compelling evidence (to be elaborated upon, *infra*) to the contrary (PA 45-47). On the foregoing basis, therefore, the Court of Appeals unanimously reversed the District Court.

In the light of this decision, the Court of Appeals did not decide the other questions raised, briefed, and argued on the appeal, such as:

(1) Whether there was, in fact, a breach of contract in the first place. The Court of Appeals did not in any way indicate acceptance of the finding of a breach but expressly noted disagreement between the parties as to the scope and applicability of the no-strike clause, stating it did not "decide this issue".

(2) Whether resolution of issues involving the legality of peaceful picketing in interstate commerce has been preempted to the National Labor Relations Board exclusively.

(3) Whether the charge of bad faith bargaining (reiterated here - see page 5 of the petition), with which the strike and picketing are inextricably enmeshed, did not require the District Court to deny the motion for a temporary injunction and dismiss the case, since that involved a charge against the Union falling squarely within Sec. 8(b) (3) of the National Labor Relations Act, as amended [29 U. S. C., Sec. 158(b)(3)], an issue to be resolved only by the National Labor Relations Board, certainly as to the injunctive aspects hereof, if not to all aspects [29 U. S. C., Sec. 160(a)]. It will be recalled that the charge of bad faith bargaining was dismissed by the District Court as irrelevant (PA 22, JA 60).

(4) The scope of the injunction and the claimed defect in the findings.

(5) The propriety of the issuance of the injunction, *pendente lite*, in the face of the existence of many issues of fact and of law.

Argument in Opposition to the Granting of a Writ in the SIU Case

Excluding what are claimed to be the issues arising out of the Officers' case, it appears that petitioner prays for the issuance of a writ in the SIU case on two grounds:

1. Questions of vital importance are raised.

2. The decision of the Court of Appeals is "believed erroneous and in conflict with applicable decisions of this Court."

The argument of SIU will not only negate the validity of these asserted grounds, but also, will present affirmative bases for denying the petition.

I. There Are No Conflicts in Circuits. Not a Single Precedent is Cited Contra. Conversely, an Enormous Array of Decisions, Amounting to Settled Law, Supports the Holding of the Court of Appeals, As Does the History of Sec. 301 of the Labor Management Relations Act.

A. The Cases.

Including the Court of Appeals decision below, the precedents are precisely *contra* to the District Court's holding, and settle the propositions that:

1. Even if the claim be established that a strike and picketing are in breach of contract, that factor does not remove the case from the category of labor disputes otherwise within Norris-LaGuardia, and

2. In a suit brought under Sec. 301 of the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 185), a District Court, by virtue of Norris-LaGuardia, has no power thereunder to issue an injunction restraining a peaceful

strike or picketing arising out of a labor controversy, even if in breach of contract.

Alcoa S. S. Co. v. *McMahon*, D. C. S. D. N. Y., 81 F. Supp. 541, affirmed 2 Cir., 173 F. 2d 567, certiorari denied, 338 U. S. 821, 94 L. ed. 498;
W. L. Mead, Inc. v. *International Brotherhood of Teamsters*, 125 F. Supp. 331, affirmed 1 Cir., 217 F. 2d 6;
Sound Lumber Co. v. *Lumber and Sawmill Workers*, 122 F. Supp. 925.

We note that the District Courts, in both the *Mead* and *Alcoa* cases, were affirmed. Quite obviously, those Courts had also accepted the proposition above-mentioned.

See, also, *Local 205, etc.* v. *General Electric Company*, 233 F. 2d 85, affirmed (albeit by application of general federal law, and not the United States Arbitration Act, 61 Stat. 669, 9 U. S. C., Secs. 1 *et seq.*) 353 U. S. 547, 1 L. ed. 2d 1028, 77 S. Ct. —, advance, decided June 3, 1957, wherein the Court of Appeals for the First Circuit, per Magruder, *Ch. J.*, expressly reaffirmed and reiterated its holding in the *Mead* case, *supra*, as well as its adherence to the two propositions above set forth. However, in cases not involving strikes and picketing, but merely enforcement of agreements to arbitrate, it held Norris-LaGuardia inapposite. The District Court, 129 F. Supp. 665, had held that Norris-LaGuardia forbade injunctions even in such cases.

Also in support of these propositions are:

Assoc. Tel. Co. v. *Communications Workers*, 114 F. Supp. 334;
Castle & Cooke Terminals v. *Local 137*, 110 F. Supp. 247;
Local 937 v. *Royal Typewriter Co., Inc.*, 88 F. Supp. 669; and
Duris v. *Phelps Dodge*, 87 F. Supp. 229.

State Courts have similarly interpreted Sec. 301 of the Labor Management Relations Act to be limited, injunction-wise, by Norris-LaGuardia.

> *General Bldg. Contractors Ass'n.* v. *Local Unions No. 542, etc.*, 1952, 370 Pa. 73, 80, 87 A. 2d 250, 254 (Supreme Court of Pennsylvania, quoted at 114 F. Supp., p. 340);
>
> *McCarroll* v. *Los Angeles County District Council, etc.*, 315 P. 2d 322 (Supreme Court of California, decided Sept. 13, 1957, in an opinion discussing the *Lincoln Mills* case, and to which we shall have occasion again to refer, infra). Also reported at ¶70, 959, of 33 Labor Cases (Commerce Clearing House), pages 94, 900, et seq.

In *In Re Third Ave. Transit Corp.*, 192 F. 2d 971, the Court of Appeals for the Second Circuit unanimously held that even a reorganization court, under a duty to conserve the property in its custody, was bound by the Norris-LaGuardia Act and could not, on behalf of the trustees of the debtor, issue an injunction to restrain a strike on the part of the union representing the employees of the debtor, even if in a breach of contract.

The fact is that so vast is the deprivation of power occasioned by the Norris-LaGuardia Act that, even if the purpose of the strike be illegal, and actually so held, an injunction restraining the acts set out in Sec. 104 of Title 29, U. S. C., may still not issue.

Milk Wagon Drivers' Union v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 85 L. ed. 63, 61 S. Ct. 122; *East Texas Motor Freight Lines* v. *International Brotherhood of Teamsters*, (CA 5th La.), 163 F. 2d 10; *Matson Nav. Co.* v. *S. I. U.*, 100 F. Supp. 730; cf. *Wilson & Co.* v. *Birl*, (CA 3d Pa.), 105 F. 2d 948.

We suggest that this array of precedents amounts to settled law, certainly so far as the District and Circuit Courts are concerned.

B. History of Sec. 301.

Most of the cases adopt (some, extremely effusively) the reasoning of Judge Rifkind in *Alcoa S.S. Co.* v. *McMahon*, 81 F. Supp. 541, affirmed 2 Cir., 173 F. 2d 567, cert. denied, 338 U. S. 821, in particular, his analysis of the legislative history of Sec. 301 of the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 185), at page 543 of 81 F. Supp. The Court of Appeals, in the instant case, also went into this history in some detail (PA 45-47). In sum, that history reveals that the original Senate bill (S. 1126, 80th Cong., 1st Sess., 1947) contained a provision making violation of the collective bargaining agreement an unfair labor practice, enjoinable as such. This was dropped before its passage by the Senate. The House bill (H. R. 3020, 80th Cong., 1st Sess., 1947) contained a clause expressly withdrawing the Norris-LaGuardia Act from suits based on breach of contract. In conference, this provision was dropped. The House Conference Report (No. 510 on H. R. 3020, See Cong. Rec., 80th Cong., 1st Sess., June, 1947) noted this, and made it clear that insofar as Norris-LaGuardia was concerned, only the rule of agency therein (Sec. 6; 29 U. S. C., Sec. 106) was made inapplicable to suits under Sec. 301 of the Labor Management Relations Act, a change embodied in Sec. 301(e) [29 U. S. C., Sec. 185(e)]. This, coupled with the fact that Sec. 301 contains no reference whatever to Norris-LaGuardia, and the fact that, in other parts of the Labor Management Relations Act dealing with injunctions, the Norris-LaGuardia Act was expressly made inapplicable [e.g., 29 U. S. C., Secs.

160(h), 178(b), and 186(e); Sec. 10(h) as set forth in Sec. 101 of the Labor Management Relations Act of 1947, and Secs. 208(b) and 302(e) of that Act, respectively], inescapably compels the conclusion that Congress, in enacting Sec. 301, did not contemplate that section as a vehicle for the issuance of injunctions in contravention to the Norris-LaGuardia Act.

We are mindful, of course, that Bull nowhere claims a conflict in Circuits, at least not in the SIU case, nor does it attempt to show (nor could it) that the instant case is not a labor dispute (which the District Court, in effect, found anyway, while the Court of Appeals found it expressly—PA 22, 39-40). The foregoing discussion, therefore, is not intended to belabor points not challenged, but to counter the statement of Bull (pet., p. 12) that the decision below is "believed erroneous". We submit that, if precedents mean anything, the Court of Appeals could not possibly have reached any other decision. It is patently correct.

II. Petitioner's Assertion of Its Belief That the Court of Appeals' Decision Is In Conflict with the Principles of Prior Decisions of This Court has No Validity Whatever.

Bull claims a variance between the decision below and *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 1 L. ed. 2d 972, 77 S. Ct. , decided June 3, 1957, advance; *Syres* v. *Oil Workers Union*, 350 U. S. 892, 100 L. ed. 785, 76 S. Ct. 152 (1955); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U. S. 30, 1 L. ed. 2d 622, 77 S. Ct. , advance, decided March 25, 1957; *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232, 94 L. ed. 22 (1949); and *Virginian Railway Co.*

v. *System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789 (1937).

Of all these cases, only *Lincoln Mills* was concerned with the relationship of Norris-LaGuardia to Sec. 301, albeit in an arbitration case. Only one, the *Chicago River* case, involved a strike and picketing. None involved the relationship of Sec. 301 to injunctions against peaceful strikes and picketing in labor disputes. These facts, plus counsel's oral argument in which it was, for all practical purposes, conceded that reliance was placed, almost exclusively on *Lincoln Mills*, undoubtedly explain why the Court of Appeals did not bother to discuss the others. Be that as it may, however, we take up these cases briefly.

The *Virginian*, *Graham*, and *Syres* cases, *supra*, involved neither strikes or picketing, nor a suit under Sec. 301 of the Labor Management Relations Act of 1947. In the former case, an employer had refused to bargain with a certified union under the Railway Labor Act (45 U. S. C., Secs. 151, *et seq.*, as amended at the time of the *Virginian* decision). In the *Graham* case and *Syres* case, an exclusive collective bargaining representative, bargaining under the authority of the Railway Labor Act and National Labor Relations Act, respectively, discriminated in the course thereof against members of the bargaining unit, on racial grounds. This Court, insofar as Norris-LaGuardia was therein concerned, adopted uniform reasoning with respect to all three cases. While adhering to the principle that positive mandates of later statutes must take precedence over the earlier and more general provisions of Norris-LaGuardia, it simultaneously refused to consider that Norris-LaGuardia was intended to inhibit the issuance of injunctive relief in such situations. That would be construing Norris-LaGuardia to defeat its own purposes, or, to use this Court's own termi-

nology, to "turn the blade inward." (*Graham* v. *Brotherhood of Firemen*, 338 U. S. 232, 237, 94 L. ed. 22, 28.)

In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U. S. 30, 1 L. ed. 2d 622, 77 S. Ct. , advance, decided March 25, 1957, still another Railway Labor Act case, this Court, by the Chief Justice, noted, in the opening paragraph (1 L. ed. 2d, at page 624, n. 2) that the relationships between labor and management in the railroad industry,

> "developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C., Secs. 151, *et seq.* It is one of those differences which underlies the controversy in this case."

Thereupon, this Court determined that the Railway Labor Act specifically intended and provided for compulsory arbitration of "minor disputes" in place and in stead of the strikes that had hitherto plagued the industry in such situations, and upheld the injunction granted below. The right to strike having been taken away, in effect, by a later enactment with respect to which a strike is entirely incompatible, Norris-LaGuardia simply does not apply. On the other hand, the Court took pains to point out (1 L. ed. 2d, at page 630, n. 24) that, in "major dispute" cases, involving changes in an agreement—a situation precisely paralleling the instant controversy—there is no compulsory arbitration provided for in place of a strike. Accordingly, the Norris-LaGuardia Act prevents the issuance of an injunction in such cases, citing *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 88 L. ed. 534, 64 S. Ct. 413, 150 ALR 810 (1944).

The statement made at p. 13 of the petition, that *Chicago River* stands for the proposition that, under the Railway Labor Act, a federal court may enjoin a strike to effectuate the Congressional purpose of enforcing collective bargaining agreements in the railroad industry is, of course, incorrect. The injunction may issue only because the statute provides for compulsory arbitration of minor disputes by the National Railroad Adjustment Board.

Finally, *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 1 L. ed. 2d 972, 77 S. Ct.——, advance, decided June 3, 1957, was concerned with the jurisdiction of a Federal Court to compel arbitration as provided for in a collective bargaining agreement. This Court found that Sec. 301 of the Labor Management Relations Act of 1947 confers substantive rights in accordance with substantive Federal law, which the

> "• • • courts must fashion from the policy of our national labor laws. • • • Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." (1 L. ed. 2d, at pages 980-981).

Having formulated these standards of guidance with respect to the federal law which the courts must fashion from our national labor policy, this Court thereupon examined one of the major expressions of our national labor policy, the Norris-LaGuardia Act, and found, following the reasoning of Chief Judge Magruder in *Local 205* v. *General Electric, supra*, 233 F. 2d 85, affirmed, 353 U. S. 547, 1 L. ed. 2d 1028, 77 S. Ct. ——, advance, that the procedural requirements of Sec. 7 of the Norris-LaGuardia Act (29 U. S. C., Sec. 107) were inapposite vis-a-vis the enforce-

ment of agreements to arbitrate, in that the failure to arbitrate "was not a part and parcel of the abuses against which the Act was aimed", referring to the categories of forbidden injunctions set forth in Sec. 4 of the Act (29 U. S. C., Sec. 104). Moreover, Sec. 8 of that Act (29 U. S. C., Sec. 108) indicates a Congressional policy in favor of arbitration. Accordingly, this Court concluded that, by virtue of its inappositeness to agreements to arbitrate, the Norris-LaGuardia Act was no bar to the enforcement thereof by a suit under Sec. 301 of the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 185).

This Court noted, at page 979 of 1 L. ed. 2d, that the "agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."[4] The employer having obtained such an agreement, it is not surprising at all that this Court rendered ineffective the employer's attempt to use Norris-LaGuardia as a vehicle for avoiding its obligations to a union. But, how different that situation is from the instant one. Here, the injunction flies squarely in the face of Sec. 4 of the Norris-LaGuardia Act. It cannot possibly be reconciled with Sec. 301 except by holding that the latter section repeals Norris-LaGuardia, *pro tanto;* that Norris-LaGuardia's absolute prohibitions against the issuance of an injunction restraining a peaceful strike are, by virtue of Sec. 301, now to be qualified by the *caveat* that this is true only if the strike is not found, either preliminarily or after trial, to be in breach of contract. Nothing in the law, the history of Sec. 301, or the array of cases on the point can justify such a proposition.

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[4] In the instant case, of course, as has been pointed out, there is no agreement to arbitrate the impasse over monetary changes on wage reopening which occasioned the strike herein. Moreover, even in such a situation, Chief Judge Magruder stated, in *Local 205* v. *General Electric Co.*, 233 F. 2d 85, 93, that "the order to arbitrate could not be accompanied by an injunction against the strike."

This Court found that the Railway Labor Act accomplished just such a change in strikes by railway workers over minor disputes. (*Brotherhood of R. Trainmen* v. *Chicago River & Indiana R. R. Co., supra,* 353 U. S. 30, 1 L. ed. 2d 622, 77 S. Ct. ——, advance). But, significantly enough, this case was not even cited in *Lincoln Mills,* although it was decided on the very day *Lincoln Mills* was argued. Nor did the majority and concurring opinions even remotely imply a *pro tanto* repeal of Norris-LaGuardia. On the contrary, the emphasis which the Court placed on the inappositeness of Norris-LaGuardia with respect to enforcement of agreements to arbitrate compels, equally emphatically, the conclusion that where an injunction order —like the one here—flies in the face of Norris-LaGuardia, it must be stricken. And this is precisely the way the Court below and the California Supreme Court interpreted *Lincoln Mills.* [*McCarroll* v. *Los Angeles County District Council, etc.,* 315 P. 2d 322; 33 Labor Cases 94, 900 (published by CCH), at p. 94,907].

Petitioner has constantly reiterated the thesis that the Court below failed to reconcile or accommodate conflicting statutory enactments, that it has failed to fashion a body of law consistent both with Sec. 301 and the Norris-LaGuardia Act, in accordance with the decisions of this Court in *Lincoln Mills, Chicago River,* and all the other cases, *supra.* Presumably, Bull seeks to imply that these cases have promulgated some radically different judicial approach, which the Court of Appeals did not follow. Of course, reconciling and accommodating statutes is old business for the courts. They do that every day, just as, by their interpretations, they fashion law every day. The point is, the Court of Appeals did just that; it did reconcile, it did fashion, it did pay attention to our national labor

policy. And, in doing so, it found that Congress did not intend that Sec. 301 supplant Norris-LaGuardia to the extent that Sec. 4 of the latter Act is to be deemed non-existent in contract cases. What petitioner is really saying, therefore, is that it is unhappy with the results of the reconciliation and fashioning process, that it wants a right to relief forbidden by Norris-LaGuardia, despite disclaimer of the idea of repeal. But, in a "law fashioning" or "reconciliation" process, no court, not even this Court, can repeal a statute. That is the exclusive business of Congress, and it is this elementary principle which so patently distinguishes the decisions of this Court, erroneously claimed by petitioner to contravene the decision below.

III. The Instant Case Does Not Present an Important Question Which This Court Should Resolve.

The foregoing discussion demonstrates that the Courts have experienced no difficulty whatever in disposing of the issue presented. The claim of conflict with decisions of this Court is, plainly and simply, without any merit or validity whatever. Certiorari-wise, therefore, petitioner does not present an important question. In fact, in a very real sense, petitioner does not present a question at all, except insofar as petitioner chooses to phrase an already settled proposition and punctuate it with a question mark. We note, moreover, that this Court has already refused certiorari to review the precise issue herein presented, in a factual context much more pressing and definitively resolved than the instant one—a wildcat strike in breach of contract against the employer's exercise of rights declared by a judgment of the district court.

Alcoa S.S. Co. v. *McMahon,* 81 F. Supp. 541, affirmed (2 Cir.) 173 F. 2d 567, cert. den. 338 U. S. 821.

Manifestly, petitioner, in the *Alcoa* case, could not induce four Justices to consider the issue therein presented of sufficient importance to warrant the attention of this Court. Nothing in the present petition makes out a case for now attaching any greater importance to that self-same issue.

As for the alleged effect on Puerto Rican economy, the allegations, whatever their claimed materiality, are made on the incompetent testimony of counsel, without reflecting the availability of other sources of transportation, or what amount of Puerto Rican shipments go to other coasts. (See RA 91-93, response of SIU, filed Dec. 4, 1957, to Bull's stay application to this Court, and SIU's motion to reverse the said stay, filed Dec. 12, 1957.) Be that as it may, however, the decision below is but the latest of a series which effectuate the really pertinent decision—that is, the decision to affect the whole American economy (including that of Puerto Rico), taken 25 years ago by the enactment of the Norris-LaGuardia Act.

IV. The Decision Sought to be Reviewed is Wholly Interlocutory. The Petition Makes No Showing Sufficient to Warrant the Grant of Certiorari In This Case.

Textbooks indicate that this Court will not ordinarily grant certiorari to review a non-final judgment. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, 1951 Edition, Matthew Bender & Co., at page 233; Stern and Gressman, Supreme Court Practice, 1954 Edition, BNA Incorporated, pages 130-131). The cases cited by Bull are clearly distinguishable, merely evidence the fact that exceptions do occur, and certainly do not amount to precedents. Whether certiorari is granted depends wholly on whether petitioner makes a case for it.

Petitioner's case for certiorari at this interlocutory stage rests on its claim that such a grant would be "in the public interest", by virtue of

1. The "unquestionable impact" of the Court of Appeals' decision below.

2. The impact on future conduct of this litigation.

As to 1, the decision below has no more impact than those in the *Alcoa* case, the *Mead* case, and the *Local 205* case, *supra*. It merely confirms settled law and states no novel proposition.

As to 2, we have noted before that the decision leaves unaffected Bull's claim for damages[6], or its right (if there is a breach) to discharge those of its employees who participated in the breach, and hire others. (*NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 83 L. ed. 682). Indeed, the contract itself provides for Bull's obtaining personnel from any source when not supplied by the Union for any reason (SA 1b). Moreover, it will be recalled that it has not been established that SIU is in breach of contract, so that notwithstanding extended consideration by this Court on certiorari, or even on the merits, a trial might well establish that Bull had no right to any relief in the first place. (See *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 1 L. ed. 2d 331, 77 S. Ct. 330, advance, decided Jan. 22, 1957.) Also, despite argument and briefing, the Court of Appeals did not reach the question as to whether the charge of bad faith bargaining and the strike and picketing inextricably enmeshed therewith raised issues, the decision on which was pre-empted exclusively to the National Labor Relations Board. The same applies to the question as to whether peaceful picketing (even if in breach of contract) could be enjoined by any tribunal other

[6] See later decisions in the *Mead* case, granting a money judgment for $359,000.00, 129 F. Supp. 313, affirmed 230 F. 2d 576, certiorari dismissed, 352 U. S. 802, 1 L. ed. 2d 37, 77 S. Ct. 21.

than the National Labor Relations Board, in the light of *Garner* v. *Teamsters*, 346 U. S. 485, 98 L. ed. 228, 74 S. Ct. 161; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 99 L. ed. 546, 75 S. Ct. 480, and, most significantly, *Youngdahl* v. *Rainfair, Inc.*, decided by this Court Dec. 9, 1957 (No. 11, October Term, 1957), 355 U. S. —, 2 L. ed. 2d 151, 78 S. Ct. —, advance. Thus, there is present the additional consideration that it is not at all certain that a purely academic question is not being presented to this Court, much less one dispositive of the question whether it is possible, in any event, for respondent to be enjoined in this lawsuit.

We are constrained to emphasize that considerations beyond those normally involved in granting or denying petitions are present here. As previously noted, the injunction issued by the District Court, notwithstanding its unanimous reversal by the Court of Appeals, was, in effect, continued by Mr. Justice Harlan's stay until final disposition of the petition. A motion to reverse this stay has not yet been acted upon. In these circumstances, a grant of certiorari inevitably entails at worst, the destruction, and, at best, a substantial nullification, of SIU's reopening rights, since the contract expires September 30, 1958 (See comments of Mr. Justice Douglas in *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 99 L. ed. 600, 75 S. Ct. 452, 1955, at p. 526 of 348 U. S.). Finally, we may reiterate here that Bull's forum shopping is such that, even after all the myriad issues herein involved are disposed of by the Federal Courts, the litigation may commence all over again, for Bull has made no secret of its intention to go back to its presently dormant State Court action, if it fails in the Federal Courts (See comments of Mr. Justice Frankfurter in the *Amalgamated* case, *supra*, at p. 519 of 348 U.S.).

In the light of all this, we urge that Bull has not made out a case meriting the grant of certiorari—certainly not at this interlocutory stage.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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January 3, 1958.

APPENDIX A

Statutory Provisions Not Included in Appendix B of Petition

I. Labor Management Relations Act, 1947, Section 301(e), 29 U. S. C., Section 185(e).

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

II. Norris-LaGuardia Act, Sections 6 and 8; 29 U. S. C., Sections 106 and 108, Respectively.

§106. *Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents*

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

§108. *Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief*

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

APPENDIX B

Relevant Provisions of Collective Bargaining Agreement with SIU Not Included In Appendix C of Petition

Article I

Section 2. * * * If, for any reason, the Union does not furnish the Company with capable, competent and physically fit persons when and where they are required, and of the ratings needed to fill such vacancies, in ample time to prevent any delay in the scheduled departure of any vessel covered by this agreement, the Company may then obtain members of the Unlicensed Personnel from any available source, in which case the Union shall be notified.

Article II

Section 3. Port Committee. For the adjustment of any grievances arising in connection with performance of this agreement which cannot be satisfactorily adjusted on board the vessel there shall be established a Port Committee at the port where articles are terminated. The Port Committee shall consist of 3 representatives from the Union and 3 representatives from the Company, and it shall be the duty of the Port Committee to meet within 24 hours, Saturdays, Sundays and Holidays excluded. In the event the Port Committee cannot agree they shall select an impartial arbitrator whose decision shall be final and binding. In the event the Port Committee cannot agree on the selection of an impartial arbitrator, then a judge of the District Federal Court shall appoint an impartial arbitrator whose decision shall be final and binding. Expenses of the arbitrator shall be paid by the party whom the arbitrator rules against in the decision.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 665

A. H. BULL STEAMSHIP CO.,
Petitioner,

against

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO, IN OPPOSITION

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Of Counsel.

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Preliminary Statement

A. H. Bull Steamship Co., hereinafter called "Bull", has applied in a single petition for writs of certiorari to review judgments in two separate cases of the United States Court of Appeals for the Second Circuit. The first case is "Bull" v. Seafarers' International Union of North America, hereinafter called "SIU", Docket No. 24840, and was argued October 8, 1957. The second case is "Bull" v. National Marine Engineers Beneficial Association, AFL-CIO, hereinafter called "MEBA", and Inter-

national Organization of Masters, Mates & Pilots, Inc., AFL-CIO, hereinafter called "MMP", Docket No. 24874, and was argued October 28, 1957.

This brief in opposition to Bull's petition, submitted on behalf of respondent "MMP", is confined solely to the questions raised in the second case to which it is a party. MMP submits that until this Court rules upon Bull's petition in the SIU case, there is no occasion to pass upon the questions raised in the MMP case.*

The SIU case involves the determination of the question whether Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185, empowers the District Court to enjoin, *pendente lite*, peaceful picketing by a "labor organization", as defined in the Act, in actions based upon an alleged breach of contract. The questions in the action to which MMP is a party are subsidiary to this question and will only arise if this Court should grant certiorari in the SIU case *and* upon consideration of the question itself, decide favorably to petitioner.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, dated October 17, 1957 (112a-120a)[1], the opinion of the Court of Appeals,

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* We do not overlook the fact that petitioner has raised a question as to whether Sec. 14(a) of the Labor Management Relations Act removes supervisors from the protection of the Norris-LaGuardia Act. But, even a cursory examination of petitioner's arguments in support of this question when compared with its refutation by the Court of Appeals (App. 29-30) clearly shows that it is not the type of question for which certiorari is granted.

[1] Page references followed by "a" are to Appendix of Defendants-Appellants filed in the appeal to the Court of Appeals. Page references preceded by "App." are to the Appendix herein.

dated November 21, 1957 (App. 19 30), and the Per Curiam opinion of the Court of Appeals dated November 27, 1957, denying a stay of the issuance of its mandate (App. 31) are not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1957. No petition for rehearing was filed. The petition for a writ of certiorari was filed on December 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1). For the reasons indicated in the Preliminary Statement, page 2, *supra*, this single petition for certiorari is inappropriate.

Questions Presented

1. Does Section 301(a)[2] of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, empower the District Court to enjoin, *pendente lite*, peaceful picketing by Bull's licensed deck officers who are admittedly supervisors and thus not statutory employees, upon the allegation by Bull that MMP, which alleges that it is not a "labor organization" as defined in the Act, has breached its collective bargaining agreement?

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[2] "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties".

II. Has Section 14(a)[3] of the Labor Management Relations Act of 1947, 29 U. S. C. § 164a, by implication[4] removed persons therein defined as "supervisors" from the protection of the Norris-LaGuardia Act, 29 U. S. C. § 101, *et seq.*?

Statutes Involved

The Statutes involved are Labor Management Relations Act, 1947, as amended, Section 2(3), 2(5), 2(11), 10(h), 14(a), 208, 301(a), 302, 29 U. S. C. § 152(3), (5), (11), 160(h), 164, 185a, 178, 186, and Norris-LaGuardia Act, Sections 1, 4, 7, 13(a)(b)(c), 29 U. S. C. Secs. 101, 104, 107, 113. These statutes are set forth at pages 32-39 of the Appendix *infra*.

Statement

This case arises out of a dispute between Bull and MMP over wages. All of the licensed deck officers and the Masters employed by Bull are members of MMP.[5] The present collective bargaining agreement between Bull and MMP

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[3] Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

[4] Where Congress intended to lift the bar of the Norris-LaGuardia Act in other sections of the Labor Management Relations Act, it did so expressly. See Sec. 10(h), Sec. 208(b) and Sec. 302(e). (App. 33-35)

[5] MMP membership is composed of non-statutory employees and MMP is therefore not a "labor organization" as defined in the Labor Management Relations Act.

provides for a wage review.[6] Pursuant to this provision, Bull and MMP met. After several meetings negotiations were discontinued because Bull flatly refused any wage increase that would have been realistic for Bull's circumstances. Unlike the collective bargaining agreement between MMP and certain other steamship companies, arbitration is not provided for in the event of disagreement during wage reviews,[7] but only for the interpretation of the meaning of the various provisions of the collective

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[6] Section 1 (c). "During the life of the agreement either party may request two wage reviews upon 60 days prior written notice provided, however, that no wage review shall be held prior to September 30, 1956. Said wage review may include general wages, overtime and penalty rates, and additional compensation for Masters and non-watchstanding Licensed Deck Officers and the rate for Relief Deck Officers."

[7] See 60a, 65a. In the collective bargaining agreement between Pacific Maritime Association and Internat'l Organization of Masters, Mates and Pilots, Inc., the wage review clause reads as follows:

Sec. 1 . . . "Either party to the agreement may request two wage reviews upon sixty (60) days' prior written notice, provided, however, that no wage review shall be held prior to June 15, 1956. Said wage review may include general wages, overtime and penalty rates, the additional compensation for Master and non-watchstanding Licensed Deck Officers and the rate for Relief Deck Officers. The provisions of Section 3 shall be applicable in the event of disagreement at the time of Wage Review. (Amended August 3, 1955.)

"If *no agreement is reached through negotiations in thirty (30) days after receipt of such notice of review, the issues shall be referred to arbitration.* The arbitrator's decision shall be rendered by the review date, and shall take effect at 12:01 A. M. on the day following the review date." (Emphasis supplied.)

bargaining agreement.[5] Therefore, commencing August 20, 1957, MMP maintained a single peaceful picket patrolling at each of two piers owned by Bull at which Bull vessels were docked. The picket carried signs which clearly indicated that the dispute was between Bull and MMP and distributed handbills carefully explaining that MMP had no complaint or difference with any other employer who might be doing business with petitioner steamship company (61a).

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[5] Section 3 of the agreement with Bull provides:

"Section 3—Grievance Procedure and Arbitration.

"(a) There shall be no strikes, lockouts or stoppages of work during the period of this Agreement. All disputes relating to the interpretation or performance of this Agreement which may arise between the parties to this Agreement shall be determined by a Licensed Personnel Board consisting of two persons appointed by the Organization and two persons appointed by the Committee for Companies and Agents. The parties shall submit any such dispute for decision by the Board and they agree to be bound by the decision of a majority thereof. The Board shall agree to such rules for procedure as it may deem necessary."

Compare the following provisions relating to wage and pension payments not involving interpretation of the agreement where arbitration was specifically provided for or rejected.

"Section 9—Wages.

"(e) . . . When vessels of power tonnage of 25,000 tons and over or vessels with a new type power plant are put into operation the Organization shall have the right to raise the issue of the wages to be paid to the Licensed Deck Officers aboard said vessels and in the event of disagreement in negotiations said issue shall be submitted to arbitration in accordance with the provisions of Section 3."

If Section 3 covered arbitration of all issues, the specific reference to arbitration would be unnecessary.

"Section 36—Pension and Welfare Plan.

"Effective June 16, 1955, the amount of contribution to the M.M.&P. Pension and Welfare Plan shall be $1.60 per day per man on Company payroll represented by the Organization for the purpose of collective bargaining. There shall be no reopening on contributions to said plan prior to September 30, 1958."

During negotiations arbitration on reopening of this provision was specifically rejected (60a-61a).

Thereupon, alleging that said picketing constituted a breach of the collective bargaining agreement, Bull made an application on August 27, 1957 for a temporary injunction, *pendente lite*, in the Supreme Court, County of Kings. Judge Cone held that there was a bona fide labor dispute (41a-46a),[9] denied the injunction *pendente lite*, and Bull's complaint was dismissed with leave to amend because of its failure to comply with New York Civil Practice Act, Section 876a, a "little Norris-LaGuardia Act." Bull thereafter, on September 9, 1957, amended its complaint and filed a new application for a temporary restraining order. In accordance with the requirement of Section 876a of the New York Civil Practice Act, Bull's application was referred to a referee to determine whether or not Bull's allegation that MMP breached its collective bargaining agreement was correct (57a-58a). At this point, strangely enough, Bull seemed to lose interest,** the hearing before the referee were postponed, and Bull served MMP with an order to show cause, before Judge Bruchhausen in the United States District Court for the Eastern District of New York, why an injunction *pendente lite* should not be granted. Thereupon, without a hearing, an injunction of broad scope was granted.

On appeal to the Court of Appeals, MMP contended that Bull's complaint on which the injunction *pendente lite* was granted failed to establish a cause of action for breach

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[9] Obviously such a finding would not have been made if there were some sinister purpose behind MMP's dispute as Bull insinuates at page 5 of its petition.

** This loss of interest is particularly significant in view of the problems present in Bull's federal court application which would not exist in the state court action. In the latter there is no problem concerning the inclusion of supervisors under the State Act and unlike proceedings governed by the Norris-LaGuardia Act, a breach of contract can be enjoined. Thus Bull would only have had to establish that its contract had been breached.

of contract since under the agreement respondent is not denied its traditional right to strike to enforce its demand made pursuant to the wage reopening provision. MMP further contended that the court lacked jurisdiction under Section 301 of the Labor Management Relation Act since that section grants jurisdiction only where one of the parties is a "labor organization" (as defined in the Act) representing "employees" (as defined in the Act). Neither statutory definition applies since MMP is not a "labor organization" and even Bull's allegations in the state court proceedings admit that MMP members employed aboard Bull's ships are supervisors (53a, 54a).

MMP further contended that the Court was without jurisdiction to issue the injunction where the complaint is based upon diversity of citizenship because of the provisions of the Norris-LaGuardia Act, 29 U. S. C. A. § 101 *et seq.* Under this Act, the Court cannot issue an order restraining any person or persons participating or interested in a labor dispute from ceasing or refusing to perform any work, or from giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence. Under this Act peaceful picketing in a labor dispute cannot be enjoined. Since the complaint fails to allege that the picketing is other than peaceful, it fails to state a claim upon which relief can be granted. Even if it does state a claim, the Norris-LaGuardia Act requires the Court to hold a hearing before granting an injunction.

The Court of Appeals, following its decision in the SIU case, held that a temporary injunction could not be granted in an action under Section 301(a) without complying with the provisions of the Norris-LaGuardia Act. It did not determine whether the strike constituted a breach of contract since the District Court exceeded its authority in any case (App. 22). The Court of Appeals further held that Section 301(a) is inapplicable to suits involving con-

tracts covering supervisors. It held that where such a contract was the subject of the action, the suit was not one between an employer and a "labor organization representing employees" for the purpose of the action. Thus, the Court of Appeals found it unnecessary to determine whether the union came within the definition of "labor organization" in all cases. It did not have to determine as an issue of fact whether the union had any non-supervisory members not covered by the contract with Bull. This act was so interpreted "in order to effectuate Congress' avowed intention to remove supervisors from the protection of the National Labor Relations Act" (App. 24-25). Otherwise, the Court held, "individuals excluded by the Act could join unions which represent some 'employees' and gain the protections of the Act"[10] (App. 25).

The Court of Appeals further held that where jurisdiction was asserted against MMP on the basis of diversity of citizenship the Norris-LaGuardia Act clearly prohibited the issuance of the injunction. The Labor Management Relations Act was held, in accordance with the legislative history of the Act and the clear meaning of the statutory language, not to have removed supervisors from the protection of any act other than the Labor Management Relations Act itself (App. 29-30).

Reasons for Not Granting the Writs

Bull advances certain reasons for granting the Writs. We shall now list them, and then answer them seriatim.

1. As interpreted by the Court of Appeals, the provisions of the Norris-LaGuardia Act and Section 301 of the Labor Management Relations Act are in conflict.

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[10] Thus, supervisory members of a "labor organization" could sue employers for breach of contract under Section 301(a) while supervisory members of a union composed solely of supervisors and therefore not a "labor organization" could not do so.

2. In the officers' case (MMP & MEBA), there is a fundamental question as to the position of supervisors under our national labor laws.

3. This case is of transcendent importance to the economy of the Commonwealth of Puerto Rico.

4. The interlocutory nature of the Court of Appeals' order, dissolving the injunction *pendente lite*, should not militate against granting certiorari because of the impact of the Court of Appeals order on the future conduct of this litigation; and

5. The decision of the Court of Appeals is in conflict with certain decisions of this Court.

Answering Bull's contentions:

1. The Court of Appeals' opinion does not cause conflict between Section 301 of the Labor Management Relations Act of 1947 and the Norris-LaGuardia Act.

This issue is the issue in the SIU case and will not be discussed here except as incidentally covered in the discussion of the alleged conflict of decisions in "5" below.

2. The position of supervisors under our national labor laws is settled. The policy has long been expressed as restoring them to the status they had prior to the passage of the Wagner Act. This is clearly expressed in the Labor Management Relations Act as well as its legislative history. See remarks of Senator Taft, 93 Cong. Rec. 3952 (1947) (App. 30). Until this case it has never been suggested that:

(a) statutory language should not be read in accordance with the statutory definitions expressly included in the Act or that

(b) the fact that Section 14(a) of the Labor Management Relations Act reiterates that an employer does not have to bargain with supervisors means that the juris-

diction of the federal District Court to grant an injunction in a labor dispute between employer and employee, employer and employer, or employee and employee, has been enlarged.

3. Allegations by Bull as to the economy of Puerto Rico not only have no relevance to the existence or nonexistence of issues of such importance that this court should add this case to its crowded calendar, but they are unsupported by any facts. The continued existence of the Commonwealth of Puerto Rico is not dependent upon the decision of this case by this Court. Bull may presently have an almost complete monopoly of the shipping between the Continental United States and Puerto Rico. This does not mean that other companies are not ready and willing to participate in this trade. In fact, prior to the time that the strike and picketing were enjoined, other companies quickly began to increase their service to the island. Bull should not be able to assert a greater right to a hearing before this court merely because of its size and near monopoly.

4. The order of the Court of Appeals dissolving the injunction *pendente lite* is plainly an interlocutory order, and the decision of the questions posed in this case will not dispose of the controversy between the parties. All that has been denied Bull is a temporary injunction, prior to a hearing, against peaceful picketing of its vessels by the vessels' officers. Even Bull doesn't claim that it has any right to an injunction in the absence of the picketing being held a breach of the collective bargaining agreement. *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282 (1957), was also a case in which a union picketed in support of a wage demand during a wage review. In holding that the picketing did not breach the collective bargaining agreement, this Court said:

> "Where there has been no express waiver of the right to strike, a waiver of the right during such a period is not to be inferred."

The Court also made this pertinent observation:

> "Unions would be wary of entering into long term contracts with machinery for reopening them for modifications from time to time if they thought the right to strike would be denied them for the entire term of such a contract though they imposed no such limitations on themselves."

Therefore, until it has been conclusively determined that MMP has breached its contract, there is no need to determine the questions posed by Bull. No hearing was held on this issue by the District Court. The Court of Appeals did not pass on this issue (App. 22).

In support of its argument of the special circumstance of the interlocutory order in this case and the impact on the future conduct of this litigation, Bull cites three cases[11] and refers to the *Wagshal* case as the "labor case". In this case the district court determined that no labor dispute was involved and issued an injunction. The Court of Appeals dismissed the appeal and held that such an interlocutory order was not appealable as a matter of right because it did not grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. This Court granted certiorari and affirmed that the facts did not constitute a labor dispute and therefore as a matter of law the district court order was not within the Norris-LaGuardia provision which granted an appeal to the Court of Appeals, as a matter of right.

In the *Larsen* case, the issue was whether the district court had jurisdiction. The district court had dismissed, holding that the suit was against the sovereign. The Court of Appeals reversed. This Court disposed of the case by upholding the district court and dismissing the complaint.

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[11] *Larsen* v. *Domestic & Foreign Group*, 337 U. S. 682 (1949); *Deckert* v. *Independence Shares, Inc.*, 311 U. S. 282 (1940); and *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437 (1948).

In *Deckert v. Independence Shares, Inc.*, 311 U. S. 282 (1940), the question of law presented was whether the Securities Act of 1933, authorized equitable relief against third parties, and this question was vital not only to the granting of temporary relief but to the granting of any relief.

Can any of these cases be said to be comparable to the MMP case where the appellate court held that peaceful picketing in a labor dispute could not be enjoined *pendente lite* without a hearing having first been held to ascertain the facts necessary to establish the court's jurisdiction?

5. MMP will not here discuss the question in the SIU case involving issuance of an injunction under Section 301 other than to state that Bull has failed to establish any real conflict between the decisions of the Court of Appeals and prior decisions of the Court; *Syres* v. *Oil Workers Union*, 350 U. S. 892 (1955); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U. S. 30 (1957); *Graham* v. *Brotherhood of Firemen and Enginemen*, 338 U. S. 232 (1949); *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937). The cases at bar are unlike those under the Railway Labor Act where statutory rights of minorities to be represented without discrimination by a majority union were created and there was a clear congressional intention to enforce them or where the same act specifically provided for arbitration of minor disputes. In these Railway Labor Act cases cited by Bull, the clear congressional intent was to permit injunctive relief. That there is no conflict between the decision below and the *W. T. Smith Lumber Co.* v. *NLRB*, 246 F. 2d 120 (1957) and *International Rice Milling Co.* v. *NLRB*, 183 F. 2d 21 (1951), cases is shown in our discussion of the first question presented.

Argument On Questions Presented

I. Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, does not empower the District Court to enjoin, *pendente lite*, peaceful picketing by Bull's licensed deck officers who are admittedly supervisors and thus not statutory employees, upon the allegation by Bull that MMP, which alleges that it is not a "labor organization" as defined in the Act, has breached its collective bargaining agreement.

MMP will not here discuss the issuance of an injunction against the SIU under Section 301 since the SIU is admittedly a labor organization.[12] Even Bull doesn't contend that Section 301 of the Labor Management Relations Act applies to a union composed solely of non-statutory employees. See *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 191 F. (2) 642 (C. A. 5, 1951), cited in *Smith Lumber Co.* v. *N.L.R.B.*, 246 F. (2) 120 (C. A. 5, 1957).[13]

The Court of Appeals found that in order for Section 301 to apply, MMP had not only to be found to be a "labor organization" but also Bull's licensed deck officers had to be found to be statutory employees. As the Court of Appeals points out, such a finding would be hardly likely in view of Bull's admission in its pleadings in the State Court Action (53a, 54a). Bull, of course, complains of this "literal" reading of the statute. Bull would make meaningless the words "representing employees" after the words "labor organization". Bull would also ignore the distinction between the language in Section 301(a) and that in Section 8(b) which refers to unfair labor practices. Section 8(b) states:

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[12] Section 301 clearly refers to "a labor organization *representing employees*." (Emphasis supplied.)

[13] The District Court granted the injunction *pendente lite* without affording MMP a hearing at which it could establish that all of its members were excluded from the statutory definition of employees.

> "It shall be an unfair labor practice for a *labor organization* or its agents * * * " (Emphasis supplied.)

The construction by the Court of Appeals for the Second Circuit is in accord with the decisions of the Fifth Circuit in *International Rice Milling Co.* v. *N.L.R.B.*, 183 F. 2d 21 (1951) and *W. T. Smith Lumber Co.* v. *N.L.R.B.*, 246 F. 2d 129 (1957), cited by petitioner as being in conflict with the decision below. In these cases, the court considered the meaning of the word "employer" in Section 8(b)(4) of the Act, and held that it was modified by the preceding word "any" and the following phrase "or other person". This made a distinction between "an employer" as defined in the statute in a limited sense and "any employer or other person", which indicates an unrestricted meaning. Such a construction did not operate to place the prohibitions of the Act upon a class or organization otherwise excluded since it only applied to the objects of a secondary boycott, not the union or primary employer. As the Fifth Circuit held in a footnote to the *Smith Lumber* case, distinguishing the *DiGiorgio* case, *supra*:

> "* * * for there the court held that the Board had no authority over a secondary boycott induced by a labor organization composed of agricultural laborers (because of the interaction of Sections 2(3), and 8(b) of the Act) since there the impact of the Board's order would necessarily have fallen directly on an organization exempt from its jurisdiction, while here and in the *Rice Milling* case the petitioner and the charged party are both subject to Board jurisdiction, and only the third parties the union is attempting to involve in the secondary boycott are exempt from the provisions of the Act."

Thus it can be seen that there is no conflict between the decisions of the Second and Fifth Circuits. Neither circuit extends the prohibitions of the Act to organizations or classes specifically excluded. The decision of the Second Circuit is in accord with the express Congressional purpose

to remove supervisors from the protection and prohibition of the Act. Congress clearly did not include a union with membership limited to supervisors within the term "labor organization" wherever employed in the Act. Nor did it make collective bargaining contracts concerning supervisors subject to suit under the Act. To rule as Bull wishes is to rewrite the National Labor Relations Act to include supervisors, contrary to congressional intent as clearly expressed in the Act itself and the legislative history.

II. Section 14(a) of the Labor Management Relations Act of 1947, 29 U. S. C. § 64a, has not by implication removed persons therein defined as "supervisors" from the protection of the Norris-LaGuardia Act, 29 U. S. C. § 101, *et seq.*

Insofar as jurisdiction is based upon diversity of citizenship, the Norris-LaGuardia Act is clearly controlling. Section 14(a) of the National Labor Relations Act does not by implication remove persons therein defined as "supervisors" from the protection of the Norris-LaGuardia Act in suits brought by individuals. That this question is free from doubt is shown by the fact that no federal court has ever held otherwise. This Court, in the *Bakery Drivers' Union* case, *supra*, has held that the only time that the National Labor Relations Act has lifted the prohibition of the earlier act, it has given the National Labor Relations Board the authority to enjoin peaceful picketing and not private parties. See National Labor Relations Act, Sections 10(h), 208, 302, 29 U. S. C. Sections 160(h), 178, 186 (App. 33-35). The Court of Appeals, below, followed the decisions of this Court. It answered the inventive argument of Bull in the following language (App. 29-30):

> "Bull argues, and the court below held, that § 14(a) of the Taft-Hartley Act of 1947, 29 U. S. C. § 164(a), makes the Norris-LaGuardia Act inapplicable to

cases involving employers and their supervisory employees. That section provides:

> 'Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.'

"Section 14(a) makes no explicit reference to the Norris-LaGuardia Act. The clause 'no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, national or local, relating to collective bargaining' contained in § 14(a) obviously does not relate to the Norris-LaGuardia Act, which prohibits federal injunctions in labor dispute cases, whether the dispute is between employers and employees, employers and employers, or employees and employees. 29 U. S. C. § 113(a). The legislative history of § 14(a) makes it clear that Congress intended the quoted clause to describe statutes which require employers to bargain collectively or be guilty of an unfair labor practice or its state law equivalent. The whole thrust of the supervisor provisions in the Taft-Hartley Act of 1947 was to remove supervisors from the operation of the National Labor Relations Act and return them 'to the basis which they enjoyed before the passage of the Wagner Act.' And no mention is made in the statute, the reports, or the congressional debate indicating that the Norris-LaGuardia Act was henceforth to be inapplicable to peaceful strikes by supervisory personnel. Moreover, contrary to Bull's contentions, denying the injunction on the basis of the Norris-LaGuardia Act does not compel Bull to bargain collectively with its supervisors in contradiction of the purpose of § 14(a). Bull can refuse to bargain, discharge the supervisors, and be guilty of no unfair labor practice or conduct proscribed by any other law, either national or local, relating to collective bargaining."

That even Bull does not consider the question which it has raised to be worthy of this court's consideration can be seen from the fact that it devotes only 15 lines of its petition to this question and in these 15 lines it merely poses the question and advances no argument as to why it should be considered by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARVIN SCHWARTZ,
Attorney for Respondent
International Organization of
Masters, Mates & Pilots, Inc.,
AFL-CIO.

MARVIN SCHWARTZ,
BETTY H. OLCHIN,
Of Counsel.

January 8, 1958.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

(Record, pages 129a-141a)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 166—October Term, 1957

(Argued October 28, 1957. Decided November 21, 1957.)

Docket No. 24874

A. H. BULL STEAMSHIP CO.,
Plaintiff-Appellee,

v.

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., AFL-CIO,
Defendants-Appellants.

Before:

CLARK, Chief Judge, and
LUMBARD and MOORE, *Circuit Judges*.

Appeal from the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*.

National Marine Engineers' Beneficial Association, AFL-CIO and International Organization of Masters,

Mates and Pilots, Inc., AFL-CIO appeal from the grant of an injunction, *pendente lite*, restraining them from continuing peaceful strikes claimed to be in violation of their collective bargaining agreements with plaintiff, A. H. Bull Steamship Co. Reversed and remanded.

James V. Hayes, of Donovan, Leisure, Newton & Irvine, New York City (A. V. Cherbonnier, of Satterlee, Browne & Cherbonnier, New York City, Theodore S. Hope, Sidney P. Howell, Jr., and Helmut J. F. Furth, of Donovan, Leisure, Newton & Irvine, New York City, on the brief), for plaintiff-appellee.

Lee Pressman, New York City, for defendant-appellant National Marine Engineers' Beneficial Association, AFL-CIO.

Marvin Schwartz, New York City (Betty H. Olchin, New York City, on the brief), for defendant-appellant International Organization of Masters, Mates and Pilots, Inc., AFL-CIO.

Clark, *Chief Judge*:

A. H. Bull Steamship Co. brought suit below against the defendant unions seeking injunctive relief and damages for alleged breaches of collective bargaining agreements between plaintiff and each defendant. Bull alleged that the court had jurisdiction of the action as a case arising under § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, and by reason of the diversity of citizenship of the parties. At the outset of the action Bull moved for an injunction *pendente lite* restraining the unions from continuing peaceful strikes then in progress and requiring them to furnish plaintiff with qualified licensed officers. These strikes and defendants' failure to provide personnel constitute the

alleged breaches of contract. The defendants moved to dismiss the action for lack of jurisdiction. The trial court heard the motions on affidavits and briefs, and determined that Bull's allegations of jurisdiction raised a substantial federal question. It denied defendants' motions and issued an extensive injunction *pendente lite*.[1] Both unions appeal from the orders and contend that the court had no jurisdiction to issue the preliminary injunction.

The facts are largely undisputed. Bull, a Delaware corporation, is an operator of ships engaged in interstate and foreign commerce. National Marine Engineers' Beneficial Association, AFL-CIO (MEBA), an unincorporated association, represents licensed engineering officers aboard

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[1] The main provisions of the injunction are contained in the following paragraphs:

"Ordered that, effective October 21, 1957 at 5:00 P. M. Eastern Daylight Saving Time, defendants National Marine Engineers' Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, their officers, agents, members, servants, employees, attorneys, and all persons in active concert or participation with them who shall or may receive actual notice of this Order, be and the same hereby are enjoined and restrained, during the pendency of this action, from picketing, striking or inciting, causing, inducing, or, in any manner, directly or indirectly, supporting any work stoppage aboard any of the vessels owned or operated by plaintiff, A. H. Bull Steamship Co., or any of its subsidiaries, wherever any such vessels may be situate or, during the pendency of this action, may call; and it is

"Further Ordered that each of said defendants specifically perform its respective agreement to furnish the plaintiff with capable, competent and physically fit licensed engineering or deck officers when and where they are required and of the ratings needed to fill vacancies necessitating the employment of such Licensed Personnel in ample time to prevent any delay in the scheduled departure of any vessel covered by said agreements; and it is

"Further Ordered that each of said defendants shall, so long as this Order remains in effect, promptly clear, validate or otherwise certify for employment aboard plaintiff's said vessels such qualified licensed officers who are members of the defendants' Unions as plaintiff may, from time to time, require."

Bull's ships. International Organization of Masters, Mates and Pilots, AFL-CIO (MM&P), a New York membership corporation, represents licensed deck officers, other than masters, aboard these ships. Bull and MEBA entered into a collective bargaining agreement on June 18, 1955, which will expire on June 15, 1958. Bull and MM&P entered into a similar agreement on July 1, 1955, which runs until September 30, 1958. Both agreements provide that "[t]here shall be no strikes, lockouts, or stoppages of work during the period of this agreement." Both agreements also provide for wage reviews after the first anniversary dates of the agreements. After the first anniversary dates each defendant notified Bull that it wished to renegotiate wages. Negotiations took place, but were unsuccessful; and on August 19, 1957, both unions called peaceful strikes to enforce their demands. The peaceful strikes continued until the trial court issued its order. The parties disagree whether or not these strikes constitute breaches of the contracts, the controversy mainly concerning whether or not the no-strike clauses are applicable to the wage-reopening clauses. Except to the limited extent discussed below, we find it unnecessary to ascertain whether or not the strikes actually constituted breaches of the contracts, since, even if they did, the trial court exceeded its jurisdiction in issuing the injunction.

Our recent decision in *A. H. Bull Steamship Co.* v. *Seafarers' International Union of North America*, 2 Cir., Nov. 21, 1957 (practically a companion case to this one) is in nearly all respects dispositive of this case. For, as we explain below, here also the issuance of an injunction is forbidden by the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.* Before reaching that point, however, we must examine the trial court's assumption of jurisdiction to issue the preliminary injunction.

Bull alleged in its complaint that the trial court had jurisdiction of the action as a case arising under § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, and by reason

of the diversity of citizenship of the parties. We first address ourselves to these allegations as they concern MEBA. MEBA is an unincorporated association, and all of its members must be citizens of states other than Delaware for diversity of citizenship to exist between it and Bull. *Levering & Garrigues Co.* v. *Morrin*, 2 Cir., 61 F. 2d 115, affirmed 289 U. S. 103; *Hettenbaugh* v. *Airline Pilots Ass'n International*, 5 Cir., 189 F. 2d 319. But the trial court did not premise its jurisdiction to issue the injunction on diversity grounds, for it found evidence that members of MEBA reside in the State of Delaware. Rather, it held that Bull's complaint presented a substantial question of federal jurisdiction under § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, which it could not decide until assuming jurisdiction over the controversy.

The substantial question involves an interpretation of § 301(a). That section provides:

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

MEBA contends that its collective bargaining contract with Bull is not a "contract between an employer and a labor organization representing employees," and thus § 301 does not give the district court jurisdiction to entertain the action. The Union maintains that all its members employed by Bull are "supervisors" and not "employees" as defined in the Act.[2] Moreover, it contends that it is not a "labor organization" as defined in the Act, because it does

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[2] The Act, 29 U. S. C. § 152, defines "employees" and "supervisors" as follows:

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual

not represent statutory "employees."[3] If MEBA's factual allegations are correct, § 301 by its own terms is inapplicable to this action.

The substantial question thus resolves itself into one of fact: Are the members of MEBA covered by the collective bargaining contract with Bull "supervisors" within the definitions of the Act? If they are "supervisors," then MEBA is not a "labor organization representing employees" for the purposes of this action. This result follows even if some members of MEBA outside of this bargaining unit are "employees." Section 2(5) of the Act, 29 U. S. C. § 152(5), defines a "labor organization" as "any organization * * * in which employees participate and which exists for the purpose * * * of dealing with employers concerning * * * conditions of work." In order to effectuate Congress' avowed intention to remove super-

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whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended, from time to time, or by any other person who is not an employer as herein defined."

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[3] The Act, 29 U. S. C. § 152(5), defines a "labor organization" as follows:

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

visors from the protections of the National Labor Relations Act,[4] this definition must be interpreted to mean an organization of "employees" covered by the collective bargaining agreement in question and which exists for the purpose of dealing with *their* employer. Otherwise individuals excluded by the Act could join unions which represent some "employees" and gain the protections of the Act. Thus if MEBA were classified as a "labor organization" for purposes of this action simply because some of its members who are not within this bargaining unit are statutory "employees," then supervisors could gain the protections of the Act by joining either vertically integrated unions or unions which, in some parts of the country, represent non-supervisory personnel. This result was not intended by Congress.[5]

The trial court had extensive evidence before it on this question of fact. This evidence included affidavits of MEBA officials testifying that MEBA's members are supervisors and Bull's allegations in the state court proceeding that "[T]he classifications of persons represented by the MM&P and MEBA being supervisory personnel, the said picketing is not the result of a labor dispute as that term is defined in the Labor Management Relations Act of 1947, as amended." In addition, as discussed below, the trial court held the prohibitions of the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.*, inapplicable to this case because it was a dispute between an employer and supervisors (not "employees"). It is difficult for us to see how MEBA's members can be "supervisors" for purposes of the Norris-LaGuardia Act, and "employees" for purposes of the Taft-Hartley Act of 1947.

The trial court nevertheless decided to defer its factual determination of the jurisdictional issue until another time. It said:

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[4] See H. R. Rep. No. 245, 80th Cong., 1st Sess. 8, 13, 15, 17; Sen. Rep. No. 105, 80th Cong., 1st Sess. 3-5, 14.

[5] H. R. Rep. No. 245, 80th Cong., 1st Sess. 15; Sen. Rep. No. 105, 80th Cong., 1st Sess. 3-4.

> "The plaintiff claims that in various prior proceedings the defendant MEBA made admissions that it was a 'labor organization,' while, on the other hand, the said defendant challenges those statements or their effect and alleges that the individuals are 'supervisors,' within the meaning of the Act. As to the present application, it is not necessary to adjudicate these issues, other than to find, as this Court does find that the plaintiff presents a substantial Federal question and that this Court can decide the matter only after it has assumed jurisdiction over the controversy. The complaint herein alleges the violation of a single right, the right to have its agreement performed and a single claim for relief. Under these circumstances, the Court assumes jurisdiction of the action. *Strachman* v. *Palmer*, 177 F. 2d 427; *Hurn* v. *Oursler*, 289 U. S. 238 and *Brown* v. *Haldale Estates, Inc.*, 151 F. Supp. 118."

Hurn v. *Oursler*, 289 U. S. 238, and *Strachman* v. *Palmer*, 1 Cir., 177 F. 2d 427, 12 A. L. R. 2d 687, involve the doctrine of "pendent jurisdiction." Those cases hold that, where a federal court in disposing of a federal ground for relief hears evidence concerning the merits of a similar non-federal ground not otherwise subject to its jurisdiction, the court may dispose of the non-federal grounds. The doctrine finds its jurisdiction in avoiding wasteful relitigation of essentially the same issues, thereby serving the convenience of both the parties and the courts. But there is no such saving where, as here, there has been no trial on the merits and the doctrine is resorted to as a means of drawing wide areas of state law into federal cognizance for the issuance of labor injunctions on affidavits, contrary to federal principles. Although Bull argues for just such an extension of federal jurisdiction, it must be said that the trial court (beyond citing the two cases as above) never goes so far and nowhere indicates that it issued the preliminary in-

junction on some separate state ground supporting the relief. It only goes so far as to hold that where a breach of contract exists it may enjoin the breach *pendente lite* and defer deciding questions of its jurisdiction until trial. But even this we hold to be stepping outside its authority.

Undoubtedly, in a proper nonlabor case, a federal court may issue a preliminary injunction pending its determination of a substantial question of federal jurisdiction of the action. If this were not so a court would be powerless to maintain the *status quo* in a proper case due solely to defendant's attack on its jurisdiction. But substantial probability that the court will find a basis for federal jurisdiction, like the probability of a plaintiff's final success on the merits, is a crucial element necessary to justify the issuance of an injunction *pendente lite*.[6] Here (postponing for a moment any consideration of the prohibitions of the Norris-LaGuardia Act) it appears quite likely that the court below has no jurisdiction under § 301 of the Taft-Hartley Act, 29 U. S. C. § 185, for the supervisory status of the MEBA employees of Bull is well established in the pleadings, affidavits, and briefs below. And where the probability of jurisdiction is doubtful, the only justification for issuing the preliminary injunction is that Bull will suffer irreparable harm from a maintenance of the *status quo* during the period necessary to determine the jurisdictional question which far outweighs the possible harm to MEBA and the expressed public policy forbidding federal courts to issue labor injunctions. This possibility is not shown here. In fact Bull's delay in seeking this relief controverts the probability of irreparable harm during the few days it might take the trial court to resolve the jurisdictional question.

The foregoing discussion applies in the case of MM&P to the extent that the trial court rested the injunction

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[6] *Hall Signal Co. v. General R. Signal Co.*, 2 Cir., 153 F. 907; *Vidya, Inc. v. Majestic Metal Specialties*, D. C. S. D. N. Y., 127 F. Supp. 467.

against it on the probability of jurisdiction under § 301. Bull now strives to sustain the injunction on state grounds. But since we hold that the Norris-LaGuardia Act prohibited the issuance of this injunction we shall not here comment on the propriety of applying state substantive rules to this controversy if jurisdiction is rested on the diverse citizenship of Bull and MM&P.[7]

The Norris-LaGuardia Act § 4, 29 U. S. C. § 104, prohibits the district court from issuing the injunction herein, for this is a case involving or growing out of a labor dispute as defined in § 13 of the Act, 29 U. S. C. § 113.[8] And

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[7] If there is a paramount federal law governing collective bargaining agreements between employers and employees in interstate commerce, as Justice Douglas seems to forecast in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, then it will control, whatever the ground of jurisdiction, whether diversity of citizenship, pendent jurisdiction, or federal question. See *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 2 Cir., 234 F. 2d 538, 540 n. 1, 545-546, citing cases. [Judges Lumbard and Moore think it unnecessary to comment on this point at this time.]

[8] 29 U. S. C. § 113 provides the following definitions:

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Congress, in § 301 of the Taft-Hartley Act of 1947, 29 U. S. C. § 185, did not impliedly repeal the Norris-LaGuardia Act to the extent that federal courts may now enjoin breaches of no-strike clauses in collective bargaining contracts. See our full discussion of this issue in *A. H. Bull Steamship Co. v. Seafarers' International Union of North America*, 2 Cir., Nov. 21, 1957.

Bull argues, and the court below held, that § 14(a) of the Taft-Hartley Act of 1947, 29 U. S. C. § 164(a), makes the Norris-LaGuardia Act inapplicable to cases involving employers and their supervisory employees. That section provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Section 14(a) makes no explicit reference to the Norris-LaGuardia Act. The clause "no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, national or local, relating to collective bargaining" contained in § 14(a) obviously does not relate to the Norris-LaGuardia Act, which prohibits federal injunctions in labor dispute cases, whether the dispute is between employers and employees, employers and employers, or employees and employees. 29 U. S. C. § 113(a). The legislative history of § 14(a) makes it clear that Congress intended the quoted clause to describe statutes which require employers to bargain collectively or be guilty of an unfair labor practice or its state law equivalent. The whole thrust of the supervisor provisions in the Taft-Hartley Act of 1947 was to remove supervisors from the operation of the

National Labor Relations Act and return them "to the basis which they enjoyed before the passage of the Wagner Act."[9] And no mention is made in the statute, the reports, or the congressional debate indicating that the Norris-LaGuardia Act was henceforth to be inapplicable to peaceful strikes by supervisory personnel. Moreover, contrary to Bull's contentions, denying the injunction on the basis of the Norris-LaGuardia Act does not compel Bull to bargain collectively with its supervisors in contradiction of the purpose of § 14(a). Bull can refuse to bargain, discharge the supervisors, and be guilty of no unfair labor practice or conduct proscribed by any other law, either national or local, relating to collective bargaining.

Order reversed; action remanded for proceedings by the district court consistent with this opinion.

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[9] Sen. Rep. No. 105, 80th Cong., 1st Sess. 28, comments on § 14 as follows: "This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity."

Senator Taft, explaining the status of supervisors under the Act, said during congressional debate:

"I shall try to summarize the changes which have been made. They are important. They make a substantial step forward toward the furnishing of equal bargaining power.

"The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." 93 Cong. Rec. 3952 (1947).

V. Court of Appeals Per Curiam—(R. 161a-162a):

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued November 26, 1957—Decision November 27, 1957)

[Same caption in each case]

Before:

LUMBARD AND MOORE, *Circuit Judges.*

Motions by defendants-appellants for immediate issuance of mandate and cross-motion by plaintiff-appellee for stay pending application for certiorari. Denied.

PER CURIAM:

The motion of the defendant-appellant for the immediate issuance of the mandate of this Court, and the cross-motion of the plaintiff-appellee for a stay pending an application to the Supreme Court for a writ of certiorari are denied.

While we recognize the importance of the questions raised in this appeal, and also that the questions are not free from doubt, it seems to us that the Supreme Court or a Justice thereof should determine the matter of the continuance of the injunction beyond the usual period for the issuance of the mandate of this Court in view of the representations of plaintiff-appellee's counsel that their petition for certiorari is being prepared and will be presented promptly. Our denial of the plaintiff-appellee's motion for a stay is without prejudice to its seeking such a stay from the Supreme Court or a Justice thereof.

* * *

Labor Management Relations Act, 1947, Sections 2(3), 2(5), 2(11), 10(h), 14(a), 208, 301(a), 302(a & e)

"DEFINITIONS

"SEC. 2. When used in this Act—

* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to

direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

"LIMITATIONS

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national of local, relating to collective bargaining.

* * *

NATIONAL EMERGENCIES

"SEC. 10. Prevention of unfair labor practices—

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115)."

* * *

SEC. 208 (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lockout or the continuing thereof, and if the court finds that such threatened or actual strike or lockout—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations; or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

• • •

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

• • •

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

• • •

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the

provisions of section 17 (relating to notice to opposite part.) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

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III. Norris-LaGuardia Act, Sections 1, 4, 7, 13(a) (b) (c)

SEC. 1:

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

• • •

SEC. 4:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

• • •

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

* * *

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 7:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction,

including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. * * *

SEC. 13:

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole

or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

* * *